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FAIR APPORTIONMENT OF MULTIPLE PUNITIVE DAMAGES

Rachel M. Janutis[*]

Courts and commentators have struggled with the imposition of multiple punitive damages for a single course of conduct.[1] On the one hand, some argue that multiple awards pose no problem because each award sanctions a defendant only for the conduct directed at the injured party before the court. For example, in a defective product case, proponents of this view would argue that each award sanctions the defendant only for the distribution of the defective product to the injured plaintiff. On the other hand, some contend that multiple awards sanction the defendant repetitively for the same conduct. For example, in a defective product case, those advocating this view would argue that each award sanctions the defendant for the underlying corporate decisions leading up to the distribution of the product, causing the sanctions to be repetitive and unconstitutional or otherwise impermissible.

Thus far, the Supreme Court has declined to delineate expressly any constitutional limits on multiple punitive damages.[2] Instead, in several recent decisions, the Supreme Court has grappled with the constitutional limits on individual punitive damage awards. In two of these decisions, *BMW of North America, Inc. v. Gore*[3] and *State Farm Mutual Automobile Ins.*

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[*] Associate Professor of Law, Capital University Law School. B.S. 1992, Northwestern University; J.D. 1995, University of Illinois. Thank you to the participants at the Ohio Legal Scholarship Workshop as well as Margaret Cordray, Susan Gilles and Roberta Mitchell for their helpful comments on earlier drafts of this paper. Thanks also to M. Alison Mincey for excellent research assistance.

[1] *See infra* notes 16-22 and accompanying text.

[2] *See infra* note 29 and accompanying text.

[3] 517 U.S. 559 (1996).

Co. v. Campbell,[4] the Court struck down state punitive damage awards as grossly excessive in relation to the state's legitimate interest in imposing punitive damages. While ultimately passing on the size of the individual awards in both cases, the Court's reasoning in these cases has implications for multiple punitive damage awards. Indeed, it seems hardly coincidental that both *Gore* and *Campbell*—the only two cases in which the Court has struck down a state punitive damage award—raised the potential for multiple awards. Likewise, at least seven of the ten cases that the Supreme Court vacated in light of *Campbell* involved substantial punitive damage awards imposed against a manufacturer or service provider distributing a product or providing a service to a national market, thus raising the possibility of multiple awards.[5] Thus, while purporting to impose limitations on individual awards, *Gore* and *Campbell* also seem to impose limitations on multiple punitive damages.[6]

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[4] 538 U.S. 408 (2003).

[5] The United States Supreme Court vacated seven such cases and remanded them for further proceedings consistent with *State Farm v. Campbell*. *See* Philip Morris USA, Inc. v. Williams, 540 U.S. 801 (2004), *vacating* 48 P.3d 824 (Or. Ct. App. 2002) (substantial punitive damage award imposed on Philip Morris for allegedly fraudulent conduct in connection with the sale and marketing of cigarettes); Chrysler Corp. v. Clark, 540 U.S. 801 (2004), *vacating* 310 F.3d 461 (6th Cir. 2002) ($3 million punitive damage award imposed on Chrysler in an action arising out of an alleged defect in the door latch used on Dodge Ram trucks); Ford Motor Co. v. Smith, 538 U.S. 1028 (2004), *vacating* Sand Hill Energy v. Ford Motor Co., 83 S.W.2d 483 (Ky. 2002) ($20 million punitive damage award imposed on Ford in an action alleging a defect in Ford pickup trucks); Ford Motor Co. v. Romo, 538 U.S. 1028 (2004), *vacating* 122 Cal. Rptr. 2d 139 (Cal. Ct. app. 2002); Key Pharmaceuticals v. Edwards, 538 U.S. 974 (2004), *vacating* Bocci v. Key Pharmaceuticals, 35 P.3d 1006 (Or. Ct. App. 2001) ($57 million punitive damage award imposed on drug manufacturer that marketed and distributed allegedly defective product nationwide); Anchor Hocking v. Waddill, 538 U.S. 974 (2004), *vacating* 27 P.3d 1092 (Or. Ct. App. 2001) ($1 million punitive damage award imposed against national manufacturer of allegedly defective fishbowl).

[6] Indeed, in both decisions members of the Court raised concerns about multiple punitive awards. *See, e.g., Gore*, 517 U.S. at 593 (Breyer, J., concurring) ("Larger damages might also 'double count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover."); *Campbell*, 538 U.S. at 423 ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other

Moreover, the limitations imposed on punitive damage awards in *Gore* and *Campbell* mirror the limitations the Court has imposed on state taxation of interstate enterprises. Specifically, in both circumstances the Court has mandated that the conduct taxed or sanctioned by the state rationally relate to the state's legitimate interest in imposing the tax or the sanction. Likewise, the Court has prohibited states from imposing taxes or sanctions on extraterritorial conduct. Finally, the Court has sought to protect the taxpayer and civil defendant from duplicative sanctions or taxes.

This paper explores the limitations the Court has placed on multiple punitive damages and the method by which the Court has sought to apply these limitations in *Gore* and *Campbell*. This paper contrasts the Court's approach to multiple punitive damages with the approach the Court has taken in applying similar limitations to the state taxation of interstate enterprises and reaches several conclusions.

First, *Gore* and *Campbell* adopt what some commentators have termed the individual retributive harm model of punitive damages[7] or what I term the apportionment model of individual punitive damages. That is, *Gore* and *Campbell* seemingly adopt the reasoning of the courts and commentators who have approved of multiple awards by defining the limits of a constitutionally permissive individual award such that an individual award sanctions only that conduct which was directed at the injured party before the court. Thus, *Gore* and *Campbell* would seem to permit courts to impose successive awards apportioned to the harm done to each different party from a single course of conduct. This apportionment model is consistent with the model the Court has adopted with respect to state taxation of interstate enterprises.

Second, the in applying this limitation to punitive damag-

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parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here. Punishment on these bases creates the possibility of multiple punitive damage awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.").

[7] *See infra* notes 16-17 and accompanying text.

es in *Gore* and *Campbell*, the Court has engaged in a substantive proportionality review. That is, the Court has focused on the outcome of the state's punitive damage process—the size of the award—and has sought to determine independently whether that outcome violates the Court's recognized limitations. In contrast, in reviewing state taxation of interstate enterprises, the Court has engaged in a procedural proportionality review. The Court has focused on the state's apportionment process. When a state's apportionment process rationally relates to the state's legitimate interest in imposing the tax, the Court has presumed that an outcome under that process conforms to the recognized limitations. Third, the Court has engaged in a more deferential procedural proportionality review of state taxation of interstate enterprises because of the difficulty states encounter in separating value generated from intraterritorial activities from the value generated from extraterritorial activities. Apportionment of multiple punitive damages poses a similar challenge because conduct directed at parties other than the injured parties before the court relates to the culpability of the defendant for the conduct directed at the injured parties before the court. Because the relationship between extraterritorial and intraterritorial activities in the imposition of punitive damages poses challenges analogous to the challenges the relationship poses in calculating taxable income of interstate enterprises, due process should dictate analogous procedural constraints. Specifically, due process should require states to employ a fair apportionment formula in determining punitive damages.

Part I addresses the implications for multiple punitive damages raised by *Gore* and *Campbell* and explores the possible limitations of this model. While sound in theory, adopting the apportionment model without some procedural constraints on the method of apportionment may prove unsatisfactory. As the Court itself has acknowledged, conduct directed at parties other than the injured party before the court is relevant to determining an appropriate level of punishment for the conduct directed at the injured party before the court.[8] Thus, individual punitive damage awards are set with reference to the entire scope of the defendant's misconduct.[9] The apportionment model as recognized in *Gore* and *Campbell* leaves punitive damage decision makers (juries and reviewing courts) to walk a tightrope. Punitive damage decision makers may not impose punitive damages to punish the entire scope of misconduct, but may impose increased punitive damages to punish a segment of that misconduct because of the entire scope of the misconduct. Adopting an apportionment model without adequate procedural constraints to guide decision makers through these mental gymnastics may render such a model unworkable.

State taxation of interstate enterprises poses similar challenges. Part II explores the limitations the Court has imposed on state taxation of interstate enterprises. Due process and the Commerce Clause prohibit states from taxing value generated by extraterritorial activities and limit states to taxing value generated by intraterritorial activities only.[10] However, extraterritorial activities enhance the value generated by intraterritorial activities. Thus, states may not tax value generated by extraterritorial activities but may tax the increased value of intraterritorial activities as a result of extraterritorial activities. The Court has recognized that these principles place procedural constraints on the manner in which states assess taxable base.[11] These principles dictate that states must use a fair apportionment formula to measure this increased value to intraterritorial activities. In other words, states must employ factors that reasonably relate to the manner in which value is generated.[12] Where this is infeasible, states must employ other measures to protect the taxpayer from the risk of paying duplicative taxes on the same base.

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[8] *See infra* notes 106-08 and accompanying text.

[9] *See id.*

[10] *See infra* notes 134, 138-39 and accompanying text.

[11] *See infra* notes 143-46, 152-62 and accompanying text.

[12] *See infra* notes 152-56 and accompanying text.

Part III argues that because the relationship between extraterritorial and intraterritorial activities in the imposition of punitive damages poses challenges analogous to the challenges the relationship poses in calculating taxable base, due process should dictate analogous procedural constraints. Specifically, due process should require states to employ a fair apportionment formula in determining punitive damages. Due process should dictate that states employ factors to constrain punitive damage decision makers in calculating punitive damages and that those factors rationally relate to the state's interest in punishing and deterring only that conduct directed at the injured party before the court. Applying these constraints to punitive damages would be consistent not only with the Court's treatment of the analogous issue of state taxation of interstate enterprises but also consistent with the Court's current punitive damage jurisprudence.

Admittedly, the focus on procedural constraints in the state taxation cases has resulted in more deferential review of state taxation than the Court has been willing to accord state punitive damage awards. Part IV explores potential reasons for according states more deference in the taxation of interstate enterprises than in the imposition of punitive damages. Ultimately, Part IV argues that these potential differences do not justify more heightened review of state punitive damage awards. Instead, a more deferential review focused on procedural constraints could deflect some criticism leveled at the Court's current jurisprudence.

I. APPORTIONING PUNITIVE DAMAGES

A. *The Potential Problem of Multiple Punitive Damage Awards*

Punitive damages are damages assessed in a civil action brought by a private plaintiff and usually awarded to the plaintiff.[13] Punitive damages, however, are damages assessed against a defendant in excess of those damages that are necessary to compensate the injured plaintiff before the court. Punitive damages generally are thought to be imposed to punish the defendant and deter the defendant and others from engaging in similar misconduct.[14] When a defendant's single act of misconduct or single course of misconduct harms multiple parties, a potential problem arises. In such a situation, each injured plaintiff may maintain a separate civil action against

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[13] Several states have adopted "split-recovery" or "extraction" schemes providing that some portion of a punitive damage recovery be paid to the state or a

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private charity. *See, e.g.*, 735 ILL. COMP. STAT. 5/2-1207 (2003); IOWA CODE ANN. § 668A.1(2)(b); Dardinger v. Anthem Blue Cross & Blue Shield, 781 N.E.2d 121 (Ohio 2002); *see* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 371-86 (2003) (discussing legislative and judicially-created split-recovery schemes).

[14] *See* Cooper Indus., Inc. v. Leatherman Tool Group, 532 U.S. 424, 432 (2001) (punitive damages "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing."); *Gore*, 517 U.S. at 568 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."); RESTATEMENT TORTS (SECOND) § 908(1) ("Punitive damages are . . . awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."); *see also* DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION § 3.11(1) at 310 (2d ed. 1993) ("Punitive damages are extracompensatory, at least in theory. They go beyond any obvious elements of ordinary compensation and are intended to punish and deter extreme departures from acceptable conduct.").

Some commentators have recognized up to six purposes for imposing punitive damages: (1) punishment; (2) deterrence; (3) compensation; (4) law enforcement; (5) fee shifting; and (6) education. *See, e.g.*, Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982) (recognizing punishment, specific deterrence, general deterrence, law enforcement, preserving the peace, compensation and litigation costs as the purposes for punitive damages); David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 374 (1994) (recognizing education, retribution, deterrence, compensation and law enforcement as functions of punitive damages); David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1278 (1976) (recognizing punishment, deterrence, law enforcement and compensation); Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163 (2003) (arguing that punitive damages, in part, compensate the injured plaintiff for her hurt feelings); *see also* Sharkey, *supra* note 13, at 389-415 (arguing that punitive damages contain an element of societal compensation). Many of these purposes can be subsumed by punishment and deterrence. For example, compensating for litigation costs and providing other private incentives for law enforcement also serves the purpose of deterrence by increasing the likelihood that misconduct will be detected.

the defendant. In those separate actions, each plaintiff may seek to recover punitive damages from the defendant for the misconduct. Thus, a defendant potentially may be subject to multiple sanctions for the same misconduct. Developments in technology have exacerbated this potential problem. As a result of these developments, a single course of conduct may injure a larger number of parties. Thus, a larger number of actions may be brought against the defendant. Further, these injured parties may be more dispersed in time and by geography.[15] Thus, the likelihood that these parties' claims will be consolidated in a single forum decreases.

Courts and commentators have struggled with the issue of whether these multiple sanctions are duplicative or overlapping and, if so, whether such duplicative sanctions are impermissible. Most courts have adopted what some commentators have recognized as an individual retributive harm model of punitive damages.[16] These courts and some commentators reject the notion that multiple punitive damages are overlapping or duplicative. Instead, these courts and commentators contend that each individual award of punitive damages represents a sanction for only the portion of the misconduct that harmed the individual plaintiff before the court. Put another way, each award of punitive damages sanctions the defendant only for its transaction or dealings with the injured party before the court.[17]

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[15] For example, consider mass torts causing diseases with long latency periods such as torts arising from exposure to asbestos, tobacco and lead paint. Not only may victims be located in jurisdictions across the country, they also may develop their injuries at different periods of time after exposure. *See* Margaret M. Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages*, 78 OR. L. REV. 275 (1999) (tracing the impact of improvements in technology on punitive damages).

[16] *See generally* Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583 (2003); Sharkey, *supra* note 13, at 359 ("The prevailing justification for punitive damages is individually oriented, retributive punishment.").

[17] *See* Rachel M. Janutis, *Reforming Reprehensibility: The Continuing Viability of Multiple Punitive Damages After* State Farm v. Campbell, 41 SAN DIEGO L. REV. 1465 (2004); *see, e.g.,* Dunn v. HOVIC, 1 F.3d 1371, 1384, 1389 (3d Cir. 1993) (noting that because the district court expressly referred to the amount of

In contrast, defendants and some commentators contend that multiple punitive damages are overlapping and, hence, duplicative.[18] In essence, these defendants and commentators argue that punitive damages sanction the defendant not for the individual transaction with the plaintiff before the court but instead for the corporate decisions or policy underlying the

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compensatory damages in calculating a remitted punitive award, the remitted award was intended to represent punishment for conduct directed at the plaintiff only); King v. Armstrong World Indus., 906 F.2d 1022, 1030 (5th Cir. 1990) ("On the record this Court cannot hold that Celotex has been punished repetitively and so excessively 'as to shock the sense of mankind' in violation of the Texas Constitution. Here the jury's award of punitive damages was specifically targeted to Celotex's conduct as it affected each plaintiff."); Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1054 (D.N.J.), *modified*, 718 F. Supp. 1233 (D.N.J. 1989); Owens Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 412 (Ky. 1998); Eagle-Picher Indus. v. Balbos, 604 A.2d 445, 472 (Md. 1992) (rejecting the defendants' due process challenge because the defendants failed to show that the factfinder making a previous award understood its award to be punishment for the full extent of the defendants' misconduct rather than punishment for the injuries to the particular plaintiff before that court); Owens-Illinois v. Armstrong, 591 A.2d 544, 557-58 (Md. Ct. Spec. App. 1991) (holding that punitive damages were awarded solely for the harm inflicted upon a specific plaintiff rather than for the totality of the harm); Colby, *supra* note 16, at 591, 650-57 (arguing that to withstand constitutional scrutiny punitive damages must punish the defendant for only the wrong done to the injured party before the court); Jerry J. Phillips, *Multiple Punitive Damage Awards*, 39 VILL. L. REV. 433, 443-44 (1994).

[18] *See* Janutis, *supra* note 17, at 1468. *See generally* John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986) (arguing that repetitive punitive liability in products liability and other mass torts cases is unconstitutional); Glasscock v. Armstrong, 946 F.2d 1085, 1096 (5th Cir. 1991) (asbestos defendant argued that repeated punitive damage awards in asbestos exposure cases rely on the same culpable conduct, thus punishing the same wrongdoing and that due process limited the number of times a corporation could be made to pay sanctions for the same culpable act); Palmer v. A.H. Robins Co., 684 P.2d 187, 215 (Colo. 1984) (pharmaceutical manufacturer argued that the potential for multiple punitive damage awards involving the same conduct offended fundamental fairness); *see also* Hansen v. Johns-Manville Prod. Corp., 734 F.2d 1036, 1042 (5th Cir. 1984) (asbestos manufacturer argued that multiple penalties violate double jeopardy); *Dunn*, 1 F.3d at 1402 (Weis, J., dissenting); *In re* Federal Skywalk Cases, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J., dissenting) ("[T]here is surely some limit imposed by law on the amount for which [defendants] can be held liable for a single wrongful act or course of conduct. Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims, would violate the sense of "fundamental fairness" that is essential to constitutional due process.").

transaction. Thus, these defendants and commentators reason that multiple punitive damages sanction the defendant for the same decisions or policy. In a more nuanced objection, some commentators also argue that even if individual punitive damages are intended to punish the defendant only for the conduct directed at the injured party before the court, individual punitive damage awards often are set with reference to the total scope of harm done by the defendant's misconduct. These commentators reason that because the trier of fact is permitted to hear evidence of the total scope of harm done by the defendant's misconduct, the trier of fact is permitted to impose punitive damages that punish the defendant for all of the individual harms caused by the its misconduct and, hence, punish the defendant for the entire scope of its misconduct.[19] This has been termed "total harm damages."[20]

The facts from *BMW of North America, Inc. v. Gore* illustrate this problem. In *Gore*, the plaintiff, Gore, purchased a new automobile for a little more than $40,000 from an authorized Alabama BMW dealer.[21] Sometime after he purchased the automobile, the plaintiff learned that the car had been damaged during shipping and repainted.[22] BMW had a nationwide policy regarding cars damaged during manufacture or shipping.[23] Under its policy, BMW sold as new without disclosing repairs, any damaged car that could be repaired for less than 3 percent of its retail price.[24] Gore brought suit against BMW alleging that BMW fraudulently failed to disclose the repainting.[25] A jury awarded Gore $4 million in punitive damages in addition to compensatory damages.[26] At trial, Gore presented evidence that BMW had sold 983 refinished cars, including fourteen in Alabama, without disclosing that the cars had been repainted at a cost of more than $300 each.[27]

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[19] *See* Gary T. Schwartz, *Mass Torts and Punitive Damages: A Comment*, 39 VAND. L. REV. 415 (1994).

[20] Colby, *supra* note 16, at 587.

[21] 517 U.S. at 563

[22] *See id.*

[23] *Id.*

[24] *Id.* at 563-64.

[25] *Id.* at 564.

[26] *Id.*

Potentially, each of the 983 consumers who purchased a refinished car could bring suit against BMW alleging that BMW fraudulently failed to disclose the repainting. Each plaintiff could seek and potentially recover punitive damages for BMW's fraudulent conduct. Most courts and those commentators who raise no objection to multiple punitive damages reason that awards to each of these 983 plaintiffs would not be duplicative because each award would punish BMW for the individual sale of a refinished car to the injured plaintiff before the court. In contrast, defendants and commentators raising an objection to multiple punitive damages reason that each award of punitive damages punishes BMW not for the individual sale to the consumer but instead for the corporate decision to sell repaired cars without disclosing the repairs. Thus, defendants and these commentators would conclude that multiple punitive damage awards are overlapping and duplicative. Further, some commentators argue that even if the punitive damage award in an individual case, such as Gore's case, was intended to punish BMW only for its sale to the individual plaintiff, the fact that the jury was allowed to consider evidence of the other sales gave the jury the opportunity to impose punitive damages to punish BMW for all 983 sales. Indeed, on appeal, the Alabama Supreme Court concluded that the jury did just that. The Alabama Supreme Court concluded that the jury arrived at its $4 million punitive award by multiplying Gore's damages by the 983 sales.[28]

B. Supreme Court Punitive Damage Jurisprudence

In a series of recent decisions, the Supreme Court has sought to impose constitutional limits on punitive damage awards. The Court has declined to consider the issue of multiple punitive damages.[29] Instead, the Court has imposed limitations on individual awards.

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[27] *Id.* at 564.

[28] *Id.* at 567.

Initially, the Court imposed procedural limitations on the imposition of punitive damages. For example, in *Pacific Mutual Life Insurance v. Haslip*,[30] the Court upheld a punitive damage award, concluding that the state procedures for assessing punitive damages provided reasonable constraints. The Court concluded that the Alabama Pattern Jury Instructions provided to the jury imposed reasonable constraints on the jury's exercise of discretion.[31] Likewise, the *Haslip* Court concluded that judicial review of a jury award under a seven-factor standard "provid[ed] for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter."[32]

Ultimately, however, the Court imposed substantive limitations on the size or amount of individual awards. In several decisions, the Court recognized a substantive right to punitive damage awards that were proportionate in amount to the states' legitimate interests in imposing the awards.[33] In two recent decisions, *BMW of North America v. Gore*[34] and *State Farm Mutual Automobile Ins. Co. v. Campbell*,[35] the Court put teeth into this right. In each of these decisions the Court struck down state courts' punitive awards because the size of the awards were grossly excessive in relation to the states' legitimate interests in imposing punitive damages.

While the Court focused on the substantive proportionality of individual awards in these two cases, the Court also recognized two principles that have implications for multiple punitive damage awards. First, the Court recognized a prohibition on sanctions imposed on extraterritorial conduct. Second, the Court concluded that due process prohibited sanctions imposed on conduct directed at third parties rather than at the injured party before the court.

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[29] *See id.* at 612 n.4 (Ginsburg, J., dissenting) ("Petitioner invites the Court to address the question of multiple punitive damages awards stemming from the same alleged misconduct. The Court does not take up the invitation . . . .").

[30] 499 U.S. 1 (1991).

[31] *Haslip*, 499 U.S. at 20.

[32] *Id.* at 22.

[33] *See id.* at 23-24; TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 462-63 (1993); *see also* Browning-Ferris Inds. v. Kelco Disposal, 492 U.S. 257 (1989) (Brennan, J., concurring).

[34] 517 U.S. 559 (1996).

[35] 538 U.S. 408 (2003).

1. *BMW v. Gore*

In *BMW of North America v. Gore*,[36] the Court struck down a punitive damage award, concluding that the punitive damage award "transcend[ed] the constitutional limit" and that the award was "grossly excessive" in relation to the state's legitimate interests in punishment and deterrence.[37] As discussed above, the plaintiff in *Gore* brought suit alleging that BMW fraudulently failed to disclose that the $40,000 car he had purchased had been repainted.[38] The jury returned a verdict finding BMW liable for $4,000 in compensatory damages and $4 million in punitive damages.[39] On appeal, the Alabama Supreme Court reduced the punitive damage award to $2 million, finding that the jury improperly computed the amount of punitive damages by multiplying the plaintiff's compensatory damages by the number of similar sales in other jurisdictions.[40] The court concluded that the award was otherwise constitutional, determining that BMW's conduct was reprehensible, the nondisclosure was profitable, the award would have a substantial impact on BMW's financial position and the award bore a reasonable relationship to the actual and potential harm.[41] Disclaiming any reliance on acts that occurred in other jurisdictions, the court concluded that a $2 million punitive damage award was a constitutionally reasonable award.[42]

On appeal, the U.S. Supreme Court recognized an award that is grossly excessive in relation to the state's legitimate interest in imposing the award violates due process. The Supreme Court devoted the bulk of its analysis to assessing the proportionality of the award. Before turning to this proportionality analysis, however, the Court first examined the purposes for which a state can award punitive damages.[43] The Court acknowledged that states have a legitimate interest in punishing and deterring misconduct and that states may impose punitive damages to further this legitimate interest.[44] For example, the Court recognized that Alabama had a legitimate interest in punishing deceptive sales practices and could further this interest by imposing punitive damages. However, the Court also explained that each state need not protect that interest in the same manner.[45] To protect each state's right to vindicate its own interest, the Court reasoned that any economic penalty imposed by a state, including punitive damages, "must be supported by the State's interest in protecting its own consumers and its own economy."[46] Thus, the Court held that a state could not impose punitive damages on a defendant to punish the defendant for or to deter the defendant from engaging in lawful extraterritorial conduct.[47]

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[36] 517 U.S. 559 (1996).
[37] *Id.* at 585-86.
[38] *Id.*
[39] *Id.* at 565.
[40] *Id.* at 567.
[41] *Id.* at 566-67.
[42] *Id.* at 567.

The Court implicitly concluded that the Alabama Supreme Court violated this extraterritoriality principle. After announcing its extraterritoriality principle, the Court observed that the Alabama Supreme Court "properly eschewed reliance on BMW's out-of-state conduct and based its remitted award solely on conduct that occurred within Alabama."[48] However, the Court also noted that "[t]he award must be analyzed in the light of the same conduct, with consideration given only to the interests of Alabama consumers, rather than those of the entire Nation" and noted that when the award is considered in relation to this limited state interest, the award is grossly excessive.[49] Thus, the Court implicitly concluded that while the Alabama Supreme Court only considered intraterritorial conduct in remitting the award, the Alabama Supreme Court imposed a remitted award to punish and deter the entire scope of BMW's nationwide misconduct rather than an award designed solely to punish and deter BMW for its misconduct to the extent that it harmed Alabama citizens and the Alabama economy.[50]

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[43] *Id.* at 568.

[44] *Id.*

[45] *Id.* at 569.

[46] *Id.* at 572.

[47] *Id.* ("[A] state may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.").

[48] *Id.* at 573-74 (citation omitted).

The Court then assessed the proportionality of the award in relation to this narrowed state interest. The Court adopted a proportionality test resembling the *Solem* framework used to assess proportionality under the Eight Amendment's Cruel and Unusual Punishment Clause.[51] The Court looked to three

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[49] *Id.* at 574.

[50] *Id.*

[51] *See* Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 905 (2004) ("[I]n *BMW of North America v. Gore*, the Court articulated an approach to reviewing challenges to punitive damages awards that bears a striking resemblance to the *Solem* inquiry."). That the Court would adopt a test based on *Solem* is unsurprising. Six terms earlier, Justice Stevens, who authored the opinion in *Gore*, joined Justice O'Connor's dissenting opinion in *Browning-Ferris Indus. of Va., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300-01 (1989) (O'Connor, J., dissenting), in which Justice O'Connor argued that the Eighth Amendment's Excessive Fines Clause applied to punitive damages and advocated the adoption of the *Solem* proportionality test to determine excessiveness. Justice O'Connor argued:

> I would adapt the *Solem* framework to punitive damages in the following manner. First, the reviewing court must accord "substantial deference" to legislative judgments concerning the appropriate sanctions for the conduct at issue. Second, the court should examine the gravity of the defendant's conduct and the harshness of the award of punitive damages. Third, because punitive damages are penal in nature, the court should compare the civil *and* criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil *and* criminal sanctions imposed by different jurisdictions for the same or similar conduct.

Id. at 301 (O'Connor, J., dissenting).

The test also resembles factors used by the Court previously to evaluate excessiveness under the Due Process Clause. *See, e.g.,* Sw. Tel. & Tel. v. Danaher, 238 U.S. 482, 490-91 (1915) (citing the defendant's lack of knowledge of wrongdoing and good faith in setting aside a civil penalty); Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111-12 (1909) (The Court considered the profitability of the misconduct, the defendant's knowledge of the misconduct and the seriousness of the harm in "guideposts" to determine that the $2 million award was grossly excessive: (1) the degree of reprehensibility of BMW's conduct; (2) the ratio between compensatory damages and punitive damages; and (3) the civil and criminal sanctions available for comparable misconduct.[52] The Court concluded that "none of the aggravating factors associated with particularly reprehensible conduct is present," noting that BMW had not committed any affirmative acts of misconduct such as making deliberate false statements or concealment and that BMW acted in good faith in establishing its disclosure policy to conform to the disclosure requirements in the strictest state statutes.[53] The Court also noted that the $2 million punitive damage award was 500 times greater than the actual harm Gore suffered and that BMW's disclosure policy did not threaten Gore with any additional harm.[54] Finally, the Court found the $2 million punitive damage award to be "substantially greater" than statutory fines available in Alabama and other states for similar misconduct.[55] Based on these three factors, the Court concluded that the $2 million award was grossly excessive in relation to the scope of Alabama's legitimate interest in imposing punitive damages against BMW.[56] In so doing, the Court engaged in a substantive proportionality review, judging for itself whether the result of the punitive damage process—the ultimate award—was proportionate to the state's interest.

2. *State Farm v. Campbell*

In *State Farm Mutual Automobile Ins. Co. v. Campbell*,[57] the Court once again struck down a state court punitive damages award as grossly excessive under the guideposts an-

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evaluating a civil penalty.).

[52] *Gore*, 517 U.S. at 574-75.

[53] *Id.* at 576-79.

[54] *Id.* at 582.

[55] *Id.* at 584.

[56] *Id.* at 585-86.

[57] 538 U.S. 408 (2003).

nounced in *Gore*.[58] The Court also expanded its extraterritoriality limitation, concluding that a state could not impose punitive damages to punish or deter either lawful or *unlawful* extraterritorial conduct.[59] Finally, the Court introduced a new limitation—a due process prohibition on duplicative punitive damage awards.[60]

In *Campbell*, the Campbells, a State Farm insured and his wife, sued State Farm for bad faith failure to settle, fraud, and intentional infliction of emotional distress.[61] Campbell had been involved in a three-car auto accident in which the driver of one car was killed and the driver of another was seriously injured.[62] The estate of the deceased driver and the injured driver sued Campbell and offered to settle for an amount equal to the policy limits of the State Farm insurance policy covering Campbell.[63] Even though the evidence strongly indicated that Campbell was at fault, State Farm refused to accept the settlement.[64] State Farm also assured Campbell that he was likely to prevail at trial, that his personal assets were safe and that he need not retain counsel.[65] At trial, however, a jury awarded the two plaintiffs damages well in excess of the policy limits.[66] State Farm initially refused to pay the excess.[67] State Farm also informed Campbell that he would be personally liable for the judgment, suggesting he "put for sale signs on [his] property to get things moving."[68] However, after Campbell's appeal was denied, State Farm paid the entire judgment, including the amounts in excess of the policy limits.[69]

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[58] *Id.* at 421-22.
[59] *Id.* at 421.
[60] *Id.* at 423.
[61] *Id.* at 414.
[62] *Id.* at 412-13.
[63] *Id.* at 413.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.* at 414.

At trial on the Campbells' bad faith claim, a Utah jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages.[70] The trial court reduced the awards to $1 million and $25 million respectively.[71] However, the Utah Supreme Court reinstated the $145 million punitive damage award.[72] State Farm appealed to the U.S. Supreme Court contending that the punitive damage award was constitutionally excessive under *BMW v. Gore.*[73] The Supreme Court found the $145 million punitive award unconstitutionally excessive.[74]

The Court again focused its analysis on its proportionality inquiry. However, the Court began its analysis by noting that the punitive damage award attempted to punish State Farm for its handling of claims made by people other than the Campbells.[75] In reaching this conclusion, the Court noted that Campbell introduced evidence regarding State Farm's nationwide claims adjustment policy, including expert testimony regarding fraudulent practices under the policy and evidence concerning State Farm's handling of first-party and non-auto insurance claims over the course of twenty years.[76] The Court also cited portions of the lower court opinions appearing to justify the heightened punitive damage award as merited by State Farm's nationwide conduct[77] and argument of coun-

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[70] *Id.* at 415.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at 418.

[75] *Id.* at 420 ("This case, instead, was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country.").

[76] *Id.* at 415.

[77] *Id.* at 420.

> "The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct directed toward the Campbells." 65 P.3d at 1143. "[T]he Campbells introduced evidence that State Farm's decision to take the case to trial was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims company wide"). This was, as well, an explicit rationale of the trial court's decision in approving the award, though reduced

sel urging the jury to impose punitive damages to sanction State Farm for its nationwide conduct.[78]

The Court concluded that this attempt to punish State Farm for activities directed at parties other than the Campbells was impermissible for two reasons. First, the Court reiterated and expanded on its holding from *Gore*, concluding that a state cannot punish lawful or unlawful extraterritorial conduct.[79] The Court reiterated its holding in *BMW v. Gore* that a state may not impose punitive damages to punish extraterritorial conduct which was lawful where it occurred.[80] The Court also expanded this holding, concluding that a state does not have a legitimate interest in imposing punitive damages to punish a defendant for extraterritorial conduct that was unlawful where it occurred.[81] The Court noted, as it had in *Gore*, that extraterritorial conduct can be relevant to demonstrate deliberateness and culpability.[82] However, the Court concluded that extraterritorial conduct must have a "nexus to the specific harm suffered by the plaintiff" to be relevant to deliberateness and culpability.[83] Further, the Court held that a jury had to be specifically instructed that it could not use punitive damages to punish lawful extraterritorial conduct.[84] Here, the Court reasoned that evidence of State Farm's nationwide claims adjustment policies was not related to its

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from $145 million to $25 million. App. to Pet. for Cert. 120a ("[T]he Campbells demonstrated, through the testimony of State Farm employees who had worked outside of Utah, and through expert testimony, that this pattern of claims adjustment under the PP&R program was not a local anomaly, but was a consistent, nationwide feature of State Farm's business operations, orchestrated from the highest levels of corporate management.")

Id.

[78] *Campbell*, 538 U.S. at 420. ("From their opening statements onward the Campbells framed this case as a chance to rebuke State Farm for its nationwide activities.").

[79] *Id.* at 421.

[80] *Id.*

[81] *Id.*

[82] *Id.* at 422.

[83] *Id.*

[84] *Id.*

handling of third-party claims like the claims at issue in *Campbell* and, thus, not relevant to an assessment of State Farm's reprehensibility.[85] Instead, the Court concluded that the award impermissibly attempted to punish State Farm directly for the extraterritorial conduct.[86]

This alone would have been a sufficient basis to reject the punitive damage award. However, the Court also concluded that the lower courts erred in relying on evidence of State Farm's nationwide claims adjustment policy "[f]or a more fundamental reason."[87] The Court held that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."[88] In reaching this holding, the Court explained:

> Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here. . . . Punishment on these bases creates the possibility of multiple punitive damages award for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.[89]

Thus, in *Campbell*, the Court recognized a need to limit punitive damages to protect the defendant from duplicative sanctions.[90]

After concluding that the punitive damage award impermissibly punished extraterritorial conduct and impermissibly subjected the defendant to the risk of duplicative sanctions, the Court continued its analysis, assessing whether the award could be sustained as proportional in relation to the state's interest in punishing and deterring solely the conduct directed at the Campbells.[91] The Court once again conducted a substantive proportionality review, using the three guideposts established in *Gore*.[92] The Court concluded that the absence of any of the aggravating factors identified in *Gore* rendered an award suspect.[93] Likewise, the Court concluded that the large disparity between punitive and compensatory damages, combined with the fact that much of the compensatory damages were to compensate the Campbells for the outrage and humiliation they suffered, rendered the award suspect.[94] Finally, the Court concluded that the punitive award "dwarfed" the most relevant civil penalty.[95] Thus, the Court concluded that the award was "neither reasonable nor proportionate to the wrong committed."[96]

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[85] *Id.*

[86] *Id.* at 423.

[87] *Id.*

[88] *Id.* at 422-23.

[89] *Id.* at 423 (citation omitted).

[90] *Id.*

C. *Implications for Multiple Punitive Damages*

While purporting to impose limitations on individual awards, *Gore* and *Campbell* also indirectly impose limitations on multiple punitive damage awards. *Campbell* rejected the Utah courts' use of evidence of third-party acts, in part because use of such evidence could result in imposing punitive damages directly on those third-party acts and, thus, subject the defendant to the risk of duplicative sanctions for those other acts in lawsuits brought by those third parties.[97] Thus, much as the opponents of multiple punitive damages contend, the Court in *Campbell* seems to conclude that multiple punitive damage awards imposed on the same conduct would be impermissible.[98]

However, *Gore* and *Campbell* also seem to adopt the individual retributive model of punitive damages espoused by lower courts and commentators.[99] The limitations imposed on individual awards in *Gore* and *Campbell* require individual punitive damage awards to be apportioned to the conduct directed at the injured party before the court.[100] Thus, rather than permitting a single total harm award then striking down subsequent awards as duplicative, *Gore* and *Campbell* dictate that each individual award sanction a defendant for different portions of the course of conduct.[101] After *Gore* and *Campbell*, any constitutionally permissible individual punitive award would be no greater than what was necessary to punish and deter only the conduct that harmed the plaintiff.[102] If each successive award sanctions the defendant for conduct directed at a different plaintiff, then no two awards would be sanctions for the same conduct. Hence, multiple awards would be permissible.[103]

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[91] *Id.* at 424-27.
[92] *Id.* at 419-29.
[93] *Id.* at 419.
[94] *Id.* at 426.
[95] *Id.* at 428.
[96] *Id.* at 429.
[97] *See supra* notes 84-89 and accompanying text.
[98] *See supra* note 89 and accompanying text.

For example, the prohibition on extraterritorial sanctions recognized in both *Gore* and *Campbell* prohibit a single court from imposing punitive damages to punish and deter a course of conduct that occurred across multiple jurisdictions.[104] Thus, after *Gore* and *Campbell*, an Alabama court, like the court in *Gore*, could not impose punitive damages to punish and deter BMW for selling repainted cars outside of Alabama. Likewise, *Campbell* limits the scope of sanctions not just to punishment for and deterrence of intraterritorial conduct but also to punishment for and deterrence of the specific conduct directed at the injured party before the court.[105] Consequently, after

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[99] *See supra* notes 16-17, 88-89 and accompanying text.

[100] *See supra* notes 88-89 and accompanying text.

[101] *See supra* notes 88-89 and accompanying text.

[102] *See supra* note 89 and accompanying text.

[103] *See* Laura J. Hines, *Due Process Limitations on Punitive Damages: Why* State Farm *Won't Be the Last Word*, 37 AKRON L. REV. 779, 811 (2004) ("If every mass tort punitive damages award is properly and constitutionally calculated to punish only the harm to a particular plaintiff, then it would seem every mass tort plaintiff could recover punitive damages awards for the same conduct—because prior plaintiffs would only have been awarded punitive damages based on their own harm.").

[104] *See supra* notes 47, 79 and accompanying text.

[105] *See supra* notes 88-89.

Campbell, the same Alabama court could impose an award to punish and deter BMW only for selling a repainted automobile to Gore. Likewise, punitive damages awarded in actions brought by each of the 983 other purchasers of repainted automobiles could be imposed to punish and deter BMW only for the sale of the repainted automobile to the customer before the court. Thus, no award would sanction BMW for the same conduct.

While sound in theory, adopting this apportionment model is complicated by the fact that conduct directed at parties other than the injured party before the court is relevant to determining an appropriate level of punishment for the conduct directed at the injured party before the court.[106] As both *Gore* and *Campbell* recognized, extraterritorial conduct can be relevant to demonstrate deliberateness and culpability of the defendant with respect to the conduct directed at the injured party before the court.[107] Thus, even apportioned punitive damage awards are set with reference to the entire scope of the defendant's misconduct.[108] As such, the limitations recognized in *Gore* and *Campbell* leave punitive damage decision makers (juries and reviewing courts) to walk a tightrope. They may not impose punitive damages to punish the entire scope of misconduct, but may impose increased punitive damages to punish a segment of that misconduct because of the entire scope of the misconduct.[109]

As both *Gore* and *Campbell* demonstrate, this can be a fine line for decision makers to walk.[110] Given evidence of third-party acts as evidence of the defendant's increased reprehensibility, decision makers in both cases apparently used this third-party act evidence to impose sanctions directly on those third-party acts rather than to impose increased sanctions on the conduct directed at the parties before the Court.[111] In both cases, however, the Court sidestepped the opportunity to provide guidance to decision makers on how to navigate this line between increasing reprehensibility and imposing sanctions directly on third-party actions. In *Gore*, the Court dismissed the sales to other consumers as essentially irrelevant to reprehensibility because the Court concluded that BMW acted with a good faith belief that these sales did not violate consumer fraud law.[112] Likewise, in *Campbell*, the Court dismissed the evidence of State Farm's handling of third-party claims because the Court concluded that the evidence lacked a sufficient nexus to State Farm's handling of Campbell's claim.[113] The Court apparently concluded that the claims lacked a sufficient nexus because they involved first-party automobile and non-automobile claims while Campbell's claim involved third-party automobile claims.[114] Because they provide no guidance on how to navigate this line, however, *Gore* and *Campbell* are unlikely to produce meaningful apportionment of punitive damages.

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[106] *See infra* notes 180-82 and accompanying text.

[107] *Campbell*, 538 U.S. at 422.

[108] *See infra* notes 181-82 and accompanying text.

[109] *See also* Hines, *supra* note 103, at 810.

[110] At oral argument in *Campbell*, at least one of the Justices noted the difficulty in making this distinction. At oral argument one of the Justices remarked,

> If you've done the same thing to other people, you can be punished more. Now, you may find a significant difference between punishing you for what you did to other people and punishing you more for what you did to this person because it is rendered more reprehensible because of what you did to other people, but I don't see a whole lot of difference between the two.

Transcript of Oral Argument, at 15; *Campbell*, 538 U.S. 408 (No. 01-1289).

[111] *See Gore*, 517 U.S. at 567; *Campbell*, 538 U.S. at 419.

[112] *See Gore*, 517 U.S. at 576-77.

[113] *See Campbell*, 538 U.S. at 422-23.

[114] *See Campbell*, 538 U.S. at 422-23; *see also id.* at 415. In her dissenting opinion, Justice Ginsburg offers a compelling criticism of the Court's rationale. Justice Ginsburg notes that State Farm employed allegedly fraudulent tactics that were similar to the tactics employed in handling Campbell's claim. *See, e.g., id.* at 431-32 (Ginsburg, J., dissenting) (noting that witnesses testified that State Farm commonly "unjustly attacked" the character, reputation, and credibility of a claimant, and that State Farm had falsely reported that the deceased driver in the Campbell claim was speeding because he was on his way to visit his pregnant girlfriend). As Justice Ginsburg contends, such evidence would be relevant to rebut State Farm's contentions that its actions in handling the Campbell claim were not inadvertent errors or negligent mistakes in judgment. *See id.* at 437.

II. THE POTENTIAL PROBLEM OF MULTIPLE STATE TAXATION

State taxation of interstate enterprises poses some of the same difficulties encountered by multiple punitive damages. A unitary course of conduct generates value (rather than harm) in several states. Thus, several states have a claim to tax the income from the unitary course of conduct (rather than a claim to sanction the misconduct). As in punitive damages, the extraterritorial activities enhance the value generated by the intraterritorial activities.

Moreover, the Court has recognized similar limitations on a state's taxation of interstate enterprises. A taxpayer cannot be subject to duplicative taxes on the same taxable base.[115] A state may not tax value generated by extraterritorial activities.[116] A tax must be reasonably related to the state's legitimate interest in imposing a tax.[117] Accordingly, consistent with the approach to multiple punitive damages implicit in *Gore* and *Campbell*, the Court has mandated that each state apportion the taxable base generated by a unitary course of conduct that represents the value generated by intraterritorial activities and tax only that apportioned base.[118]

Further, in *Gore* and *Campbell* the Court recognized that extraterritorial activities may be relevant to the sanctionability of the defendant's intraterritorial activities.[119] Similarly, with respect to a state's taxation of interstate enterprises, the Court has recognized that the value of intraterritorial activities is enhanced by extraterritorial activities and that each state is entitled to tax that increased value while insisting that states may not tax the value generated by the extraterritorial activities directly.[120] However, in contrast to the approach it has taken with respect to punitive damages, the Court has recognized the difficulty and imprecision involved in measuring the increased value of intraterritorial activities as a result of extraterritorial activities as opposed to taxing the value generated by extraterritorial activities directly.[121] As a result, in applying the extraterritoriality, proportionality and duplication limitations to state taxation of interstate enterprises, the Court has charted a different path. The Court has placed only broad limitations on a state's ability to tax interstate enterprises, focusing primarily on the process by which the state calculates its apportioned share of the value and giving great deference to the substantive result of that process.[122]

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[115] *See infra* note 140 and accompanying text.

[116] *See infra* notes 134, 138-39 and accompanying text.

[117] *See infra* notes 131-33 and accompanying text.

[118] *See supra* note 137 and accompanying text.

[119] *See supra* notes 49, 82-83 and accompanying text.

[120] *See supra* notes 134, 138-39 and accompanying text.

A. The Potential Problem of Multiple State Taxation of Interstate Enterprises

State taxation of interstate enterprises poses risks of extraterritorial and duplicative taxation similar to the risk of multiple punitive damages. When enterprises operate across state lines, a single course of conduct generates value, and hence a taxable base, in multiple states. Moreover, allocating a portion of the value from this single course of conduct to discrete activities defies precise calculation. Thus, state taxation of interstate enterprises poses a risk of extraterritorial taxation and duplicative taxation similar to the problems posed by multiple punitive damages.

For example, assume a corporation maintains corporate offices in State A, manufactures a product in State B, and engages in marketing and promotional activities in State C that result in sales of its product in State C. Also assume that State C seeks to impose a corporate income tax on income earned by corporations doing business in State C. If State C were to impose an income tax on all of the income the corporation earned from sales in State C, such a tax necessarily would impose a tax on value generated by extraterritorial activities. The corporation's sales activities in State C alone clearly did not generate the income from the sales in State C. Rather, the corporation's managerial activities in State A and manufacturing activities in State B also contributed to the value realized in State C. Thus, a state tax on interstate enterprises poses a risk of extraterritorial taxation.

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[121] *See infra* note 143-46 and accompanying text.

[122] *See infra* notes 141-79 and accompanying text.

Likewise, a state tax on interstate enterprises poses a risk of duplicative taxation.[123] The corporation in the hypothetical has done business in State A and State B as well as State C. The corporation has done business in State A by maintaining its corporate office in State A and has done business in State B by carrying on its manufacturing operations in State B. Further, income earned on sales in State C is earned, in part as a result of these activities in States A and B. Thus, if State A and State B imposed a corporate income tax on corporations doing business in State A and State B, State A and State B also might seek to tax the income earned from the sales in State C. If each state were to tax the income earned on sales in State C, the corporation would be subject to duplicative taxes.

The risk of duplicative and extraterritorial taxation could be avoided if each state taxed only that portion of the income generated by the interstate enterprise that was generated by intraterritorial activities. However, extraterritorial activities enhance the value of those intraterritorial activities. Thus, determining what portion of income is generated by intraterritorial activities defies precise calculation. For example, determining what portion of income generated by the corporation's sales in State C is attributable to its sales activity in State C defies precise calculation. Likewise, determining what portion of the income generated by the sales in State C is attributable to the managerial activities in State A and the manufacturing activities in State B, defies precise calculation.

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[123] The risk of duplicative taxation differs slightly from the risk of duplicative punitive damages. No risk of intraterritorial duplicative taxation exists because each state assesses only a single tax on the taxpayer. In contrast, because multiple plaintiffs may bring a lawsuit within a single state, multiple punitive damages pose a risk of both intraterritorial and extraterritorial duplicative sanctions.

B. The Supreme Court's Regulation of State Taxation of Interstate Transactions

The Supreme Court has grappled directly with the potential issues raised by state taxation of interstate enterprises. In confronting these issues, the Court has recognized several principles. These principles are consistent with the principles which underlie *Gore* and *Campbell*. For example, the Court has held that both the Due Process Clause and the Interstate Commerce Clause prohibit a state from taxing extraterritorial values.[124] The Court has recognized that both provisions also protect a taxpayer from being subject to multiple tax burdens on the same value.[125] Finally, the Court has recognized that due process dictates that a state tax be rationally related to the state's legitimate interest in assessing taxes to pay for the costs of providing services and protections to the taxpayer.[126] As such, the Court has concluded that a state may not assess a tax on a taxable base that is grossly disproportionate to values attributable to the taxing state.[127] Thus, consistent with its approach to punitive damages in *Gore* and *Campbell*, the Court has required states to adopt an apportionment model of taxation. That is, the Court has required states to apportion the total taxable base from a unitary course of conduct, allowing each state to tax only that portion of the total taxable base that was generated by intraterritorial activities.

In contrast to its approach with respect to punitive damages, in applying these principles the Court has acknowledged apportionment is problematic to achieve because value generating activities do not break down precisely along territorial lines.[128] Thus, the Court has not imposed limitations to prohibit all multiplicity and duplication. Instead, the Court has recognized that some extraterritoriality and some multiplicity are permissible. Further, the Court's review has been primarily procedural with a limited role for substantive review of the proportionality of state taxes. The Court has focused on the procedures the taxing state employs to apportion a part of the value earned by an interstate enterprise to the taxing state. The Court has mandated that the factors used to determine the taxing state's apportioned value bear a reasonable relationship to the manner in which value is generated.[129] If the factors are rationally related to the manner in which value is generated, the Court accords great deference to a tax that is the result of the process. In only rare circumstances will the Court set aside a tax as disproportionate even though the process used to allocate taxable base to the taxing state was reasonable.

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[124] *See infra* notes 134, 138-39 and accompanying text.

[125] *See infra* notes 140 and accompanying text.

[126] *See infra* notes 131-33 and accompanying text.

[127] *See supra* note 147 and accompanying text.

[128] *See supra* notes 152-53 and accompanying text.

1. The Three Limits on State Taxation of Interstate Transactions

As it has with respect to a state's ability to impose punitive damages, the Court has recognized two sources of limits on a state's ability to tax interstate transactions and enterprises: the Due Process Clause and the Commerce Clause.[130] With respect to due process, the Court has recognized that a state tax must be rationally related to the state's legitimate interest in assessing taxes to pay for the cost of providing services and protections to the taxpayer.[131] The Court has explained that a tax is rationally related to this legitimate interest when the base taxed is rationally related to the value generated by intraterritorial activities. [132]Conversely, the Court has concluded that a state tax violates due process when the income attributed to the state is grossly disproportionate to the value generated by intraterritorial activities. This is consistent with the Court's recognition in *Gore* that punitive damages must be rationally related to the state's legitimate interest in punishment and deterrence and that an award which is grossly disproportionate to the state's interest violates due process. Indeed, this limitation is consistent with due process limits on state legislation generally. The Court has long recognized that due process mandates that state legislation be rationally related to a legitimate state interest.[133] Here, the Court has acknowledged that a state has a legitimate interest in assessing taxes to pay for the cost of providing services and protections to the taxpayer. The Court has recognized a relationship between the cost of providing services and protections to the taxpayer and the taxpayer's value generating activities within the state. Further, as it did in *Gore* and *Campbell*, the Court has recognized that this due process limitation, in part, prohibits a state from taxing value generated by extraterritorial activities.[134]

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[129] *See infra* notes 150-62 and accompanying text.

[130] Thus far, the Court has rested its punitive damages decisions expressly on the Due Process Clause. However, in its reasoning in both *Gore* and *Campbell*, the Court has implicated Commerce Clause concerns as well. *See, e.g.*, *Gore*, 517 U.S. at 585 ("[BMW's] status as an active participant in the national economy implicates the federal interest in preventing individual states from imposing undue burdens on interstate commerce.").

[131] *See* John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective,* 45 WM. & MARY L. REV. 319, 345 (2003) ("The fundamental rationale for allowing states to tax income with an in-state source is that the state provides benefits and protections that allow the income to arise in the first instance.").

[132] Moorman Mfg. Co. v. Bair, 437 U.S. 267, 273 (1978) (quoting Norfolk & W.

The Court also has recognized that the Dormant Commerce Clause places limits on state taxation of interstate enterprises. Initially, the Court vacillated between the view that the Com-

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R.R. v. Mo. State Tax Comm'n, 390 U.S. 317, 325 (1968)); *see also* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 166 (1983) (quoting Exxon Corp. v. Wis. Dep't of Revenue, 447 U.S.207, 219-20 (1980)) (requiring a rational relationship between "income attributed to the State and the intrastate values of the enterprise."); John E. Nowak & Ronald D. Rotunda, *Sales and Use Tax Credits, Discrimination Against Interstate Commerce, and the Useless Multiple Tax Concept*, 20 U.C. DAVIS L. REV. 273, 289 (1987) ("[T]he second due process test is whether the tax 'is fairly related to the services provided by the State.'") (alteration to original); 1 PAUL J. HARTMAN & CHARLES A. TROST, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION § 2:4 at 25 (2d ed. 2003).

[133] *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.4 (2004). This limitation applies to economic legislation such as state taxes. Legislation implicating fundamental rights must be narrowly tailored to serve a compelling state interest. *See id.* § 14.3.

[134] ASARCO Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 315 (1982); *see also Container Corp.*, 463 U.S. at 166 ("At the very least, this set of principles imposes the obvious and largely self-executing limitation that a State not tax a purported 'unitary business' unless at least some part of it is conducted in the State.").

merce Clause protected interstate commerce from any state taxation on the ground that taxation would impede the free flow of trade between the states and the view that businesses engaged in interstate commerce could be obligated to pay "their just share" of a state tax burden despite the Commerce Clause.[135] However, in *Complete Auto Transit, Inc. v. Brady*, the Court ultimately sought to balance between the two views, rejecting the view that the Commerce Clause immunized interstate commerce from state taxation but concluding that the Commerce Clause prohibited taxes that produced certain "forbidden effects."[136] The *Complete Auto* Court adopted a four-part test, requiring a tax on interstate commerce: (1) to be applied to an activity with which the taxing state has a substantial nexus; (2) to be fairly apportioned; (3) to be non-discriminatory against interstate commerce; and (4) to be fairly related to the services provided by the State.[137]

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[135] Goldberg v. Sweet, 488 U.S. 252, 259 (1989); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278-79 (1977). *See generally,* HARTMAN & TROST, *supra* note 132, §§ 2:15–2:17.

[136] *Complete Auto*, 430 U.S. at 288-89.

[137] The Court did not expressly adopt this four-prong test in *Complete Auto.* Rather, the Court noted that the taxpayer had not challenged the tax at issue on any of these grounds and approved of a line of decisions which upheld state taxes because the taxes at issue in those decisions did not violate any of these four criteria. *See generally Complete Auto*, 430 U.S. at 277-78; 279. However, in subsequent cases, the Court began to refer to this four-part test as the *Complete Auto* test. *See, e.g.,* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 183 (1995) ("Since [we decided *Complete Auto*], we have often applied, and somewhat refined, what has come to be known as *Complete Auto*'s four-part test."); *Goldberg*, 488 U.S. at 259-60 ("Since the *Complete Auto* decision we have applied its four-pronged test on numerous occasions. We now apply it to the Illinois tax."); D.H. Holmes Co. v. McNamara, 486 U.S. 24, 30 (1988) (noting that in *Complete Auto* the Court upheld the tax at issue because the taxpayer's activity had a substantial nexus with the taxing state, the tax was fairly apportioned, the tax did not discriminate against interstate commerce and the tax was fairly related to the benefits provided by the taxing state and concluding that the Court had applied the *Complete Auto* criteria to "evaluate the validity of state taxes vis-à-vis the Commerce Clause" in subsequent cases); *see* Swain, *supra* note 131, at 328 ("The elements of this test were articulated in *Complete Auto Transit, Inc. v. Brady*, although it took later decisions to enshrine Complete Auto as the definitive four-pronged test for the validity of a state tax under the Dormant Commerce Clause.").

The fair apportionment requirement protects the interstate taxpayer from two of these forbidden effects. First, the Commerce Clause, like due process, prohibits state taxation of extraterritorial activities.[138] Fair apportionment limits the extraterritorial reach of a state tax.[139] Second, fair apportionment reduces the risk of duplicative taxation.[140] Thus, as it has with respect to a state's ability to impose punitive damages, the Court has sought to assess a tax in relation to the state's legitimate interest in imposing the tax. Moreover, in assessing this relationship, the Court has recognized limits on a state's ability to tax values generated by the extraterritorial activities of an interstate enterprise and limits to protect the taxpayer from duplicative taxes.

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[138] *See Container Corp.*, 463 U.S. at 164 ("Under both the Due Process and the Commerce Clauses of the Constitution, a State may not, when imposing an income-based tax, 'tax value earned outside its borders'.") (quoting ASARCO v. Idaho Tax Comm'n, 458 U.S. 307, 315 (1982)); HARTMAN & TROST, *supra* note 132, § 2:4, at 25.

[139] *See Container Corp.*, 463 U.S. at 169-70 ("Such an apportionment formula must, under both the Due Process and Commerce Clauses, be fair . . . . The second and more difficult requirement is what might be called external consistency—the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated. The Constitution does not 'invalidat[e] an apportionment formula whenever it *may* result in taxation of some income that did not have its source in the taxing State . . . .' Nevertheless, we will strike down the application of an apportionment formula if the taxpayer can prove by 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportions to the business transacted . . . in that State,' or has 'led to a grossly distorted result'." (citations omitted)); *see also* Walter Hellerstein, *Is 'Internal Consistency' Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138, 186 (1988) ("Wholly apart from its role in preventing multiple taxation, the fair apportionment criterion serves to limit the territorial reach of state power by requiring that the state's tax base corresponds to the taxpayer's in-state presence.") (footnote omitted); Bradley W. Joondeph, *The Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation*, 71 FORDHAM L. REV. 149 (2002) (arguing that fair apportionment is a "lower order" constitutional norm serving the "higher order" norms prohibiting extraterritorial and multiple taxation); Nowak & Rotunda, *supra* note 132, at 296 (noting that an unreasonable apportionment formula violates due precess by taxing income that was generated in another state).

[140] *See Jefferson Lines*, 514 U.S. at 184-85 ("The difficult question in this case is whether the tax is properly apportioned within the meaning of the second prong of *Complete Auto's* test, 'the central purpose [of which] is to ensure that each State taxes only its fair share of an interstate transaction.' This principle of fair share is the lineal descendant of *Western Live Stock*'s prohibition of multiple taxation, which is threatened whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed: the portion of the value by which one State exceeded its fair share would be taxed again by a State properly laying claim to it." (quoting *Goldberg*, 488 U.S. at 260-61)); *see also* Joondeph, *supra* note 139; Swain, *supra* note 131, at 340 n.104, ("It might be explained to the 'novice' at this point that fair apportionment serves to prevent multiple taxation, an obvious burden on interstate com-

2. Fair Apportionment Review

In its state taxation decisions, the Court has taken a significantly different and more pragmatic[141] approach to applying these proportionality, extraterritoriality and duplication principles. First, both inherently in its approach and expressly, the Court has recognized that some duplicative taxation and extraterritorial taxation will exist, in part, because of the relationship between extraterritorial and intraterritorial activities.[142] Second, the Court has eschewed reliance on size of the tax base apportioned to the taxing state as an indicator of state overreaching and declined to undergo a substantive review of the state's taxing decision. Instead, the Court has focused on the state's process of apportionment, upholding a state tax

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merce.").

[141] Walter Hellerstein, Michael J. McIntyre & Richard D. Pomp, *Commerce Clause Restraints on State Taxation After* Jefferson Lines, 51 TAX L. REV. 47, 48 (1995) (noting that the Court itself has referred to its approach as "resolved on the basis of the 'practical or economic effect of the tax' . . . and reflect[ing] pragmatism.").

[142] *See, e.g., Container Corp.*, 463 U.S. at 169-70 ("The Constitution does not 'invalidat[e] an apportionment formula whenever it *may* result in taxation of some income that did not have its source in the taxing State . . . .'" (quoting Moorman Mfg. Co. v. Mair, 437 U.S. 267, 272 (1978))). The Court also has tolerated duplication that results when different states apply different apportionment formulae to the same unitary conduct. *See Container Corp.*, 463 U.S. at 168 (noting that the Commerce Clause simply does not forbid every form of multiple taxation—whether actual or potential); Hellerstein *supra* note 139, at 140 (noting that "[s]o long as a state's formula is intrinsically fair, it is not constitutionally infirm merely because the adoption by a sister state of another intrinsically fair formula could create 'some overlap' in taxation" and explaining that eliminating overlap would require the Court to prescribe a uniform method of apportionment—a task "the Court has declined to undertake.").

when the factors used by the state to apportion value to the state appear reasonable. Finally, even when a state has failed to apportion value, the Court has sustained a tax if the state has taken other measures to reduce the risk of duplicative taxation or if the taxpayer does not face a significant risk of duplicative taxation.

Early in the Court's efforts to impose limitations on state taxation of interstate enterprises, the Court recognized that States could not apportion value from an interstate enterprise to intraterritorial activities with mathematical precision. For example, the Court observed that "this Court has long realized the practical impossibility of a state's achieving a perfect apportionment of expansive, complex business activities,"[143] "[t]he difficulty of making an exact apportionment is apparent,"[144] and "[g]oing-concern value . . . is an elusive concept not susceptible of exact measurement."[145] Thus, the Court has given the states broad latitude in apportioning value and has been reluctant to set aside a tax that results from the application of an "honest state effort" to apportion values based on the size of the taxable base claimed.[146]

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[143] Int'l Harvester Co. v. Evatt, 329 U.S. 416, 422 (1947).

[144] Hans Rees' Sons, Inc. v. N.C., 283 U.S. 123, 133 (1931).

[145] Norfolk & W. R.R. v. Mo. State Tax Comm'n, 390 U.S. 317, 324 (1968).

[146] *Evatt*, 329 U.S. at 422-23 ("Unless a palpably disproportionate result comes from an apportionment, . . . this Court has not been willing to nullify honest state efforts to make apportionments."); *see Exxon Corp.*, 447 U.S. at 223 (recognizing that an apportionment formula is only a "rough approximation" of the values generated by intraterritorial activities); *see also* HARTMAN & TROST, *supra* note 132, § 2:4 at 24-25 ("The Court recognizes that the "going concern" value resulting from organic unity is an elusive concept and not susceptible of exact measurement. As a consequence, the States have been permitted considerable latitude in devising formulas to measure taxable values. Rough approximation of value rather than precision or mathematical exactness is sufficient to satisfy constitutional requirements."); Nowak & Rotunda, *supra* note 132, at 296-97 ("Because the income from a multistate business attributable to activities in a particular state is not always clearly identifiable, the Supreme Court has found that states need not have absolutely precise apportionment formulas."); Joondeph, *supra* note 139, at 175 ("[T]he prohibition on extraterritorial state taxation is not truly a prohibition. To be sure, the general rule, applicable in the run of cases is that states may not tax extraterritorial value. Because states would effectively be incapable of imposing sales taxes (or other taxes that resemble them) if the Con-

The Court has observed that it will strike down a tax that is the product of a fair apportionment formula only if the results are "grossly out of proportion with the value earned within the state or "greatly distort[] results."[147] Early in the Court's jurisprudence, the Court sought to substantively evaluate the size of the taxable base apportioned to the state to determine whether it was grossly disproportionate to the values generated in the taxing state. For example, in *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, the Court stuck down a tax where the state apportionment formula attributed 80% of the taxpayer's profits to the taxing state while the taxpayer demonstrated that only 21% of those profits could be attributed to the taxing state.[148] Likewise, in *Norfolk & Western R.R. v. Missouri State Tax Commission*, the Court struck down a tax based on the "rolling stock" of a railroad when the state apportionment formula apportioned 8% of the railroad's rolling stock to the state when, in fact, the railroad generally employed only 2.7% of its rolling stock in t he taxing state on any given day and an assessment based on the actual count of rolling stock in the taxing state would have been less than half of the value assessed by the taxing state.[149]

More recently, however, the Court has retreated from a substantive review of the size of the taxable base. For example, in *Container Corp. of America v. Franchise Tax Board*, the Court refused to strike down the application of an otherwise reasonable apportionment formula when it resulted in a four-

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stitution rigidly required them to divide the sales and use tax base, the Court has permitted such taxes without fair apportionment. And in doing so, the Court has necessarily allowed the states to engage in some measure of extraterritorial taxation."); Hellerstein, *supra* note 141, at 186-88 (arguing that fair apportionment serves both to limit multiple taxation and to prevent taxation of extraterritorial activities and that a credit system does not satisfy fair apportionment because the credit system does not limit the state's extraterritorial reach); Nowak & Rotunda, *supra* note 132, at 296-98.

[147] *See* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 184 (1983); *see also Norfolk & W. R.R.*, 390 U.S. at 326 (setting aside a state tax assessment of the property of an interstate railroad because the state apportionment formula "led to a grossly distorted result.").

[148] *See* Hans Rees' Sons, Inc. v. N.C. *ex rel.* Maxwell, 283 U.S. 123 (1931).

[149] *Norfolk & W. R.R.*, 390 U.S. at 326-27.

teen percent increase in the income attributed to the taxing state over the method used by the taxpayer for internal accounting.[150] Indeed, the Court has not set aside a tax on the ground that the base was disproportionate to the values connected to the taxing state since 1968.[151]

Instead, the Court's proportionality review has focused on the state's procedure for apportionment. The Court has not constitutionalized a particular apportionment formula.[152] Instead, the Court requires that the formula be fair.[153] To be fair, the Court requires, in part, that the formula be "externally consistent."[154] As the Court has explained, "External consistency . . . looks not to the logical consequences of cloning, but to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State."[155] The Court reviews the factors that the taxing state uses to allocate value to itself to determine whether those factors bear a rational relationship to the manner in which value is generated in the interstate transaction.[156] If the factors used bear a rational relationship to the manner in which value is generated, the formula is likely to tax intraterritorial activities only. As such, a tax assessed under such a formula is proportional. For example, in *Central Greyhound Lines, Inc. v. Mealey*, the Court upheld a tax on gross receipts of common carriers involved in interstate transportation as externally consistent because the taxable portion of gross receipts allocated to the taxing state was based on the number of miles the carrier traveled within the taxing state.[157] The Court concluded that the percentage of the carrier's total miles which were traveled within the taxing state would bear a reasonable relationship to the percentage of the carrier's total receipts earned in the taxing state.[158] Likewise, in *Container Corporation of America*, the Court approved of a three-factor formula used to apportion corporate income. The three-factor formula, similar to the formula used by many states, weighed the proportion of the taxpayer's total property located within the taxing state, the proportion of the taxpayer's total payroll paid within the taxing state and the proportion of the taxpayer's total sales that are made within the taxing state to determine what proportion of the taxpayer's total income was attributable to the taxing state.[159] The Court concluded that the three-factor formula was externally consistent because it reflected a reasonable sense of how income is actually generated.[160] The Court conceded that the three-factor formula was "imperfect."[161] However, the Court explained that the three factors relied upon—property, payroll and sales—"appear in combination to reflect a very large share of the activities by which value is generated."[162] In both cases, the Court concluded that the tax assessed was proportional to the taxing state's interest in imposing the tax.[163]

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[150] *Container Corp.*, 463 U.S. at 184.

[151] *See* Norfolk & W. Ry. Co. v. Mo. State Tax Comm'n, 390 U.S. 317, 329 (1968).

[152] *Container Corp.*, 463 U.S. at 164 ("[T]he Constitution imposes no single [apportionment] formula on the States." (citing Wisconsin v. J.C. Penney Co., 311 U.S. 435, 445 (1940))).

[153] *Id.* at 169.

[154] *See id.* The Court imposes two consistency requirements. First, a tax must be internally consistent. *Id.* That is a tax must be structured so that if every state were to impose the same tax, interstate commerce would not be subject to multiple taxes. Second, a tax must be externally consistent. *Id.* For purposes of this paper, external consistency is most relevant.

[155] Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 185 (1995).

[156] *Container Corp.*, 463 U.S. at 169.

Moreover, even in cases where the state has not implemented a fair apportionment process, the Court has sustained a tax which comports with the underlying principles of proportionality, extraterritoriality and duplication. For example, if apportionment based on the manner in which value is generated is not possible, then the Court looks to see whether the taxing state has any other provision in its taxing scheme to alleviate this potential multiple taxation and whether the taxpayer is subject to a real risk of multiple taxation. Even when a tax leaves the taxpayer open to the risk of multiple taxation, the Court has excused a taxing state's failure to apportion only a value of the interstate transaction when the taxing state has taken other steps to alleviate the potential burden of multiple taxation.[164] For example in *Goldberg v. Sweet*, the taxpayer challenged an Illinois state tax on interstate phone calls.[165] The Court recognized that the Illinois tax taxed the full value of any interstate phone call charged to a service address located in Illinois rather than some portion fairly attributable to the value generated in Illinois.[166] The Court also recognized that the state in which the telephone call was billed or paid also might have a substantial nexus to the transaction such that it could tax the transaction.[167] Thus, the Court recognized that interstate telephone calls might be subject to double taxation.[168] For example, an interstate call might be taxed once in Illinois if billed to a service address in Illinois and once in another state if billed or paid within that state.[169] However, the Court sustained the tax because a provision in the tax structure granted a credit to a taxpayer for any taxes paid to another state on the same interstate phone call.[170] The Court concluded that this credit operated to avoid actual multiple tax.[171]

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[157] Cent. Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 663 (1948); *see also* American Trucking Assoc. v. Scheiner, 483 U.S. 266, 283 (1987) (approving of fuel consumption tax based on the mileage traveled within the state); Thomas Truck Lease, Inc. v. Lee County, 768 So. 2d 870, 877 (Miss. 1999) (tax on 30% of the value of the trucks which traveled 50% of their miles within the state was properly apportioned).

[158] *Mealey*, 334 U.S. at 663.

[159] *See Container Corp.*, 463 U.S. at 170; Hellerstein, *supra* note 141, at 141 n.19.

[160] *Container Corp.*, 463 U.S. at 183.

[161] *Id.* at 182.

[162] *Id.* at 183.

[163] *Container Corp.*, 463 U.S. at 184; *Mealey*, 334 U.S. at 663.

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[164] *See* Joondeph, *supra* note 139, at 151, 153-71 (recognizing fair apportionment as a "lower order" constitutional value and protection from multiple taxation as Court's "higher order" constitutional objective).

[165] Goldberg v. Sweet, 488 U.S. 252, 257 (1989).

[166] *Id.* at 256.

[167] *Id.* at 263.

[168] *Id.*

[169] *Id.*

[170] *Id.* at 263-64.

[171] *Id.* at 264.

The Court rejected the taxpayers' contentions that the taxing state could not tax the full value of an interstate telephone call but rather had to apportion the value of the call.[172] The Court noted that the tax on interstate telephone calls did not involve "the movement of large physical objects over identifiable routes," but instead involved the "more intangible movement of electronic impulses through computerized networks."[173] The Court reasoned that "[a]n apportionment formula based on mileage or some other geographic division of individual telephone calls would produce insurmountable administrative and technological barriers."[174] The Court concluded that the tax structure, including the credit for taxes paid to other states, was "a realistic legislative solution to the technology of the present-day telecommunications industry."[175]

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[172] *Id.* at 262.

[173] *Id.* at 264.

[174] *Id.* at 264-65.

[175] *Id.* at 265. Indeed, the Court and state courts have consistently sustained sales and uses taxes, recognizing that credit provisions operate to protect the taxpayer from multiple taxation. *See, e.g.,* D.H. Holmes Co. v. McNamara, 486 U.S. 24, 31 (1988) (state use tax was fairly apportioned because it provided a credit for sales taxes paid to other states); Gen. Motors v. City and County of Denver, 990 P.2d 59, 72-73 (Colo. 1999) (use tax on parts and materials purchased in other states but used to construct a finished product in the taxing state was externally consistent because it provided a credit for sales and uses taxes paid in other states on the same parts and materials); *see also* Yamaha Corp. v. State Bd. of Equalization, 86 Cal. Rptr. 2d 362, 368 (Cal. Ct. App. 1999) (use tax was externally consistent because it provided credit for taxes paid to another jurisdiction); Int'l Thomson Publ'g, Inc. v. Tracy, 683 N.E.2d 1091, 1095 (Ohio 1997) (same).

Actually, the tax credit ensures only that the interstate taxpayer will pay the equivalent of one tax. *See generally Gen. Motors Corp.*, 990 P.2d at 71-72. The interstate taxpayer actually may pay taxes to more than one jurisdiction. *See Goldberg*, 488 U.S. at 263-64. The credit ensures that the total amount of tax paid to all jurisdictions is no more than the total amount of tax the taxpayer would have paid to the taxing jurisdiction had the sale and use of the parts and material been solely instate. *See id.* at 264. If the taxes paid to the previous jurisdiction were less than the total tax due in the taxing jurisdiction, the taxpayer will pay the difference to the taxing jurisdiction. *See Gen. Motors Corp.*, 990 P.2d at 71-72. For example, if the taxpayer paid a tax to a previous jurisdiction on the parts and materials based on one percent of their purchase price, while the taxing jurisdiction taxes the parts and materials at two percent of their purchase price, the taxpayer would pay a one percent tax to the taxing jurisdiction.

Finally, the Court has excused failure to apportion a tax when no other state possessed a substantial nexus with the taxable event. For example, in *Oklahoma Tax Commission v. Jefferson Lines*,[176] the taxpayer challenged a state sales tax imposed on the purchase within the state of a ticket for interstate transportation originating in the state.[177] As in *Goldberg*, the state taxed the full value of the bus fare. The Court concluded that the tax did not need to be apportioned to be externally consistent. The Court reasoned, in part, that no other state possessed a nexus with the purchase substantial enough to allow the state to tax the purchase.[178] Thus, the taxpayer did not face a realistic risk of multiple taxation.

As the above examples demonstrate, the Court has recognized the relationship between extraterritoriality and duplication and proportionality. A tax is disproportionate because it reaches extraterritorial values or results in duplicative taxation. Further, the Court has measured the proportionality of the tax by reviewing the procedure used to calculate the tax rather than the size of the taxable base apportioned to the state. Finally, the Court has taken a pragmatic approach to apportionment, approving of other methods that achieve the Court's "higher" constitutional objective of protecting the taxpayer from duplicative burdens.[179]

See id. at 71.

[176] 514 U.S. 175 (1995).

[177] *Id.* at 178.

[178] *Id.* at 190-91 ("The taxable event comprises agreement, payment, and delivery of some of the services in the taxing State; no other State can claim to be the site of the same combination. . . . In sum, the sales taxation here is not open to the double taxation analysis on which *Central Greyhound* turned, and that decision does not control."); *see also* Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 251 (1987) (rejecting taxpayers' apportionment challenge to a tax on wholesaling and manufacturing because "the activity of wholesaling—whether by an in-state or an out-of-state manufacturer—must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax."); Gulf Caribe Maritime, Inc. v. Mobile County Revenue Comm'r, 802 So. 2d 248, 256-57 (Ala. Civ. App. 2001) (ad valorem tax on personal property domiciled in a state need not be apportioned because no state other than the state of domicile has a substantial nexus with the property).

[179] *See* Joondeph, *supra* note 139, at 175.

III. A FAIR APPORTIONMENT APPROACH TO MULTIPLE PUNITIVE DAMAGES

As demonstrated above, the extraterritoriality and duplication limits that the Court recognized in *Gore* and *Campbell* are consistent with the limits that the Court has recognized in the state taxation cases.[180] Likewise, expressly in the state taxation cases and implicitly in *Gore* and *Campbell*, the Court has adopted an apportionment requirement: states must apportion taxing jurisdiction over income from a unitary course of conduct and tax only that portion that is attributable to activities within the taxing state. Similarly, states must apportion regulatory jurisdiction over a unitary course of conduct and sanction only that conduct which was directed at the injured party before the court. Achieving apportionment of punitive damages likely will pose the same difficulties that achieving apportionment of income from interstate enterprises has posed. As the Court has recognized, much like the extraterritorial activities of an interstate enterprise add a "going-concern" value to the enterprise's intraterritorial activities, activities directed at third parties—either extraterritorial or intraterritorial—contribute to the sanctionability of the conduct directed at the injured party before the court.[181] These third-party activities may contribute to the scienter of the defendant with respect to the activities directed at the injured party before the court. For example, BMW's sale of automobiles with undisclosed repairs to third parties established that BMW's failure to disclose the repainting to Gore was the intentional result of a corporate policy rather than an isolated incident. Measuring this enhanced reprehensibility is as imprecise as measuring going concern value.[182] Indeed, the Court's own analysis illustrates the difficulty in capturing this enhanced reprehensibility without sanctioning the extraterritorial activity directly. Thus, as it has in reviewing state taxation of interstate transactions, the Court should adopt a fair apportionment review of multiple punitive damages. Such a review would best accommodate the interests of the state in punishing and deterring wrongful conduct while reducing the defendant's exposure to duplicative sanctions for the same misconduct.

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[180] *See* Cordray, *supra* note 15, at 298-99 (arguing that the limits on state sovereignty imposed under *Gore* are consistent with the limits on state taxation of interstate enterprises).

[181] *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003) (stating that extraterritorial activities are relevant to show knowledge).

[182] Cordray, *supra* note 15, at 313 (noting that the distinction between punishing a defendant directly for other transactions and using evidence of other transactions to help evaluate the defendant's blameworthiness "is a fine one" and opin-

Implementation of fair apportionment review would involve a three-step analysis. Unlike the substantive proportionality review employed in *Gore* and *Campbell*, fair apportionment review would focus on the procedures employed in determining a punitive award. First, under fair apportionment review, a punitive damage award would be sustained if it were the product of an underlying punitive damage scheme that was reasonably designed to produce an award that was sufficient to punish and deter only that conduct which was directed at the party before the court. The court would not constitutionalize a specific procedure for awarding punitive damages. Instead, an award would be sustained if the factors a state adopted to guide the punitive damage decision makers' discretion were rationally related to the state's legitimate interest in punishment and deterrence of the conduct *directed at the injured party before the court*. Second, even if a state failed to apply a reasonable apportionment formula, a court would consider whether the state had employed other measures to eliminate the possibility of duplicative sanctions. Finally, a court would set aside a punitive damage award that was the product of a fair apportionment process only in the rare case that the award was grossly disproportionate to the state's legitimate interest in punishment and deterrence.

To illustrate what I mean by fair apportionment review, let

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ing that juries may not be able to understand and apply it); Rachel A. Van Cleave, *"Death Is Different," Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217, 271 (2003) (noting that "it is not exactly clear whether there is a real difference" between considering conduct as a measure of reprehensibility and punishing that conduct).

us consider how fair apportionment review would have applied to *Gore*. Fair apportionment review would have changed the reasoning but not the outcome in a case such as *Gore*. The award in *Gore* would have failed fair apportionment review not because the size of the award seemed disproportionate under a series of guideposts. Rather, the award would have failed because the factors guiding punitive damage decision makers under the Alabama punitive damage system did not relate to the sanctionability of the conduct directed solely at Gore.

Under Alabama's punitive damage system, the jury initially determined the size of a punitive damage award. In reaching the award, the jury had wide discretion to determine the proper amount of punitive damages provided the award not exceed "an amount that will accomplish society's goals of punishment and deterrence."[183] The award of punitive damages was not required to bear any particular relationship to actual damages.[184] The jury was instructed generally as to the purposes of punitive damages and that it was required to take into consideration the character and degree of the wrong as well as the necessity of preventing similar wrongs in determining the amount.[185] Further, as *Gore* illustrates, the jury was permitted to hear evidence about conduct directed at parties other than the injured party before the court. For example, the *Gore* jury heard evidence about the 983 other refinished cars BMW had sold in the year in which Dr. Gore bought his car.[186] As the Alabama Supreme Court explained in *Gore*, the extraterritorial sales were relevant under Alabama law to show that BMW engaged in a pattern or practice of nondisclosure and such a pattern was relevant in evaluating the reprehensibility of BMW's conduct.[187]

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[183] BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 624 (Ala. 1994) (quoting Green Oil v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989) (citations omitted)).

[184] *Id.*

[185] Alabama Pattern Jury Instruction 11.03 reads in relevant part:

> The purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiff by way of punishment to the defendant, and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future. . . . Should you award punitive damages, in fixing the amount, you must take into consideration the character and degree of the wrong as shown by the evidence in the case, and the necessity of preventing similar wrongs.

ALA. PATTERN JURY INSTRUCTION 2d 11.03 (Ala. Pattern Jury Instructions Comm.—Civil 1993).

[186] *Gore*, 646 So. 2d at 623.

Any award of punitive damages was subject to review by both the trial court and at least one appellate court.[188] A reviewing court was to remit an award if it was excessive or increase an award if it was inadequate. In reviewing the award, the court was to consider what the Alabama courts termed the "*Hammond* factors":

(1) The relationship between the amount of punitive damages and the actual and potential harm caused by the defendant's conduct;

(2) The degree of reprehensibility of the conduct, including the duration of the conduct, the degree of awareness of the hazard, any concealment and the existence and frequency of similar past conduct;

(3) The profitability of the misconduct;

(4) The defendant's financial position and the impact the judgment would have upon it;

(5) The plaintiff's litigation costs; and

(6) Any criminal and civil sanctions previously imposed on the defendant for the same conduct.[189]

Thus, an award of punitive damages ultimately was based on several factors, including the amount of actual and potential harm the misconduct caused, the relative reprehensibility of the misconduct as defined, in part, by the scope of the conduct, and the profitability of the misconduct. While these factors provided constraints on jury and reviewing court discretion, the constraints they imposed did not reasonably relate to the state's limited legitimate interest in imposing punitive damages to punish the defendant *only for the conduct directed at the*

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[187] *Id.* at 625, 627.

[188] ALA. CODE §§ 6-11-23 to -24 (LexisNexis 1993).

[189] *Gore*, 646 So. 2d at 624 (quoting Green Oil v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989).

plaintiff before the court. Thus, the Alabama punitive damage system would not survive a fair apportionment review.

Three factors in particular demonstrate the overbreadth of the Alabama punitive damage scheme. While each of these factors has a legitimate purpose, without adequate constraint, each also all invites the punitive damage decision maker to punish more than the conduct directed at the plaintiff. First, Alabama law instructed the jury and the reviewing courts to consider the culpability of the defendant.[190] That the "punishment should fit the crime" and, thus, that a more reprehensible act should be punished more severely than a less blameworthy act, are elemental principles of punishment.[191] Thus, considering reprehensibility or culpability of the defendant rationally relates to the goal of punishment. Further, activities directed at third parties may bear on the reprehensibility of the defendant. For example, such activities directed at third parties may bear on the defendant's knowledge at the time it entered into the transaction with the injured party before the court, which influences both liability for and the amount of punitive damages.[192] To the extent that third-party activities bear on the reprehensibility of the misconduct directed at the injured party before the court, consideration of those third-party activities rationally relates to determining an apportioned share of punitive damages.

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[190] ALA. PATTERN JURY INSTRUCTION 11.03 instructed the jury to consider the "character" of the wrong in fixing the amount of the punitive award. *See supra* note 185 and accompanying text. The *Hammond* factors directed reviewing courts to consider the "degree of reprehensibility of the conduct." *See supra* note 189 and accompanying text.

[191] *See* Steven R. Salbu, *Developing Rational Punitive Damage Policies: Beyond the Constitution*, 49 FLA. L. REV. 247, 266 (1997) (Our system commonly recognizes that "'punishment must . . . match, or be the equivalent, of [the wrongdoer's] offense'." (quoting HERBERT LIONEL ADOLPHUS, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHIES OF LAW 231 (1982))).

[192] *See, e.g.,* Troncalli v. Jones, 514 S.E.2d 478, 484 (Ga. Ct. App. 1999) (allowing evidence of past similar misconduct admissible in liability phase of trial to show liability for punitive damages); Weeks v. Baker & McKenzie, 74 Cal. Rptr. 2d 510, 532 (Cal. Ct. App. 1978) (allowing evidence of the defendant's prior misconduct and evidence that he had been warned and reprimanded by his employer for that misconduct was relevant to show that he was aware his conduct would cause injury and either intended to cause injury or acted with a conscious disregard of the plaintiff); Southerland v. Argonaut Ins. Co., 794 P.2d 1102, 1107 (Colo. Ct. App. 1990) (allowing evidence of late payments to other clients admissible to show pattern of purposeful delays in paying benefits and to prove motive).

Second, Alabama law required decision makers to consider the actual and potential harm caused by the defendant's misconduct.[193] The actual and potential harm can be a measure of the seriousness of the misconduct.[194] Thus, considering actual and potential harm is another measure to ensure that the punishment fits the crime. As such, the consideration of actual and potential harm can be said to rationally relate to the goal of punishment.

Finally, Alabama law directed reviewing courts to consider the "profitability" of the defendant's misconduct as well as the defendant's "financial position" and the impact a punitive damage judgment would have on its financial position.[195] Factors like net worth and financial standing also relate to the goal of punishment. As Justice Breyer noted in his concurring opinion in *Gore*, "a fixed dollar award will punish a poor person more than a wealthy one."[196] Moreover, financial position or net worth may bear on deterrence. In part, the effectiveness of a monetary sanction in deterring misconduct is relative to the overall financial position of the defendant. For example, a

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[193] ALA. PATTERN JURY INSTRUCTION 11.03 instructed the jury to consider the "degree" of the wrong in determining the amount of punitive damages. *See supra* note 185 and accompanying text. The *Hammond* factors directed reviewing courts to consider the relationship between the actual and potential harm caused by the defendant's misconduct and the amount of punitive damages. *See supra* note 189 and accompanying text.

[194] *See* Lawrence Crocker, *The Upper Limit of Just Punishment*, 41 EMORY L.J. 1059 (1992); Karlan, *supra* note 51, at 907 ("The second guidepost—"ratio"—rested on a distinctive characteristic of damages actions: the fact finder is already asked, in determining the amount of *compensatory* damages, to quantify the amount of harm the defendant has caused to the plaintiff. By their very nature, then, damages cases provide a piece of information that criminal cases lack: an indication of the gravity of the offense that uses the very currency in which punishment is to be meted out."); *see also* Owen, *supra* note 14, at 1317 n.291 (acknowledging that the amount of harm has "some minor relevance to the determination of the amount of punitive damages").

[195] *See supra* note 189 and accompanying text.

[196] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 591 (1996) (Breyer, J., concurring).

$10,000 penalty might have a stronger deterrent effect on an individual of modest means than a sanction of the same amount would have on a wealthy individual.[197]

However, under the Alabama system (as well as punitive damage systems in many other states) these factors served as a vehicle to allow decision makers to consider evidence of transactions with third parties and harm resulting from these third-party transactions. Further, the Alabama system (as well as the systems used in many other states) allowed decision makers to consider evidence of third-party transactions without any constraints on the use of this evidence. For example, in *Gore* the jury used the existence of BMW's 983 sales to consumers as a direct measure of BMW's reprehensibility rather than as an indicator of BMW's scienter at the time it entered into the transaction with Gore. Likewise, courts have permitted punitive damage decision makers to consider harm resulting from third-party transactions or potential third-party transactions in assessing the relationship between actual harm and punitive damages.[198] Courts have also allowed punitive damage decision makers to consider the profitability of an entire scope of misconduct[199] or a defendant's total financial condition.[200]

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[197] *See* Salbu, *supra* note 191, at 288-89. *But see Gore*, 517 U.S. at 591 (Breyer, J., concurring); Zazu Designs v. L'Oreal, 979 F.2d 499, 508 (7th Cir. 1992); David Crump, *Evidence, Economics, and Ethics: What Information Should Jurors Be Given to Determine the Amount of a Punitive Damage Award?*, 57 MD. L. REV. 174, 217-23 (1998).

[198] *See, e.g.*, Williams v. Phillip Morris, Inc., 48 P.3d 824, 841 (Or. Ct. App. 2003) (noting in its discussion of ratio that "[i]t is thus appropriate to consider the effects of the defendant's actions on persons other than [the plaintiff] in determining the amount of punitive damages.").

[199] *See, e.g.*, Gen. Motors Corp. v. Johnston, 592 So. 2d 1054, 1061 (Ala. 1992) (noting that GM sold approximately 600,000 vehicles and sustaining the punitive damage award against GM, in part, because even after paying the $15 million award, the profit GM made on the total sales of the vehicle at issue would be greater than the profit GM would have made had it replaced the allegedly defective part).

[200] *See, e.g.*, Weeks v. Baker & McKenzie, 74 Cal. Rptr. 2d 510, 534 (Cal. Ct. App. 1998) (sustaining a $3.5 million punitive damage award, in part, because it was only five percent of the defendant's total net worth); Lakin v. Senco Prods., Inc., 925 P.2d 107, 121 (Or. Ct. App. 1996) (sustaining $4 million punitive damage award, in part, because it was only give percent of the defendant's total net

As *Gore* demonstrates, under a punitive damage scheme that permits decision makers to consider evidence of third-party activities without further constraints, decision makers may impose punitive damages to punish those third-party activities directly. Indeed, the Court recognized this in *Campbell*.[201] This is true whether evidence of third-party activities is admissible to show the defendant's state of mind with respect to the activities directed at the party before the court, or to show the harm or potential harm from those third-party activities, or to show the profitability of those third-party activities. Because unbridled use of third-party activities may result in imposition of punitive damages to punish and deter those third-party activities, a scheme that provides for such use is not reasonably designed to produce an award necessary to punish and deter only that conduct directed at the party before the court. Instead, the scheme raises the possibility of impermissible extraterritoriality because the scheme poses the risk that punitive damage decision makers will impose punitive damages to punish third-party activities that lack any nexus with the imposing state. Likewise, such a scheme poses an impermissible risk of duplicative sanctions. A defendant may be sanctioned repeatedly for the third-party activities if the third parties later bring suit against the defendant.

However, these factors could be honed to provide constraints on decision makers rationally related to the goal of producing an apportioned punitive damage award. For example, a fairly apportioned scheme would inform all punitive damage decision makers—both the jury and reviewing courts—of the limited purpose for which they may award punitive damages. While the decision makers were informed generally that the award was to punish and deter the defendant's

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value); *see also* Campbell v. State Farm Mut. Auto Ins. Co., 65 P.3d 1134, 1147 (Utah 2001) (vacating trial court remittitur and reinstating $145 million punitive damage award, noting that the award was 0.26 of one percent of the defendant's total net worth and that the defendant's large financial worth merited a larger award), *rev'd*, 538 U.S. 408, 429 (2003).

[201] *Campbell*, 538 U.S. at 424.

misconduct under the Alabama scheme,[202] they were not informed that they were to award punitive damages to punish and deter only that portion of the misconduct directed to the plaintiff before the court. Thus, the decision makers were left with the impression that the award was to punish the defendant for the entire scope of his or her misconduct and deter the defendant from engaging in this misconduct anywhere.

Second, an apportionment system would limit consideration of third-party activities to only those third-party activities that bear on the defendant's state of mind in connection with the activities directed at the injured party before the court. It would preclude consideration of harm resulting from third-party activities as a measurement of the seriousness of the defendant's misconduct. If the wrong to be punished is only the wrong directed at the party before the court, only the actual and potential harm from the activities directed at the party before the court can be considered a measure of the seriousness of that wrong. Harm from potential and actual third-party activities would not be a measure of the seriousness of the wrong directed at the party before the court. Thus, a fairly apportioned scheme would preclude use of such harm as a measure of culpability.

Likewise, a fairly apportioned system would preclude use of total profitability of harm as a measure of profitability. Instead, a state would have to require the decision maker to consider the profit the defendant earned from the particular transaction with the injured party before the court.

Finally, while a fairly apportioned system would permit use of third-party activities to demonstrate the defendant's state of mind in connection with the activities directed at the party before the court, a fairly apportioned system also would inform decision makers that they were to consider third-party activities only to demonstrate the defendant's state of mind with respect to the activities directed at the party before the court. At least one commentator has argued that such a system would comport with the historical origins of punitive damages,[203] and, in *Campbell* the Court suggested that such an instruction was required.[204]

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[202] *See supra* note 185 and accompanying text.

IV. FAIR APPORTIONMENT REVIEW: A MODEST PROPOSAL

At first blush, a fair apportionment standard of review may seem a significant departure from the Court's current approach. Such an approach certainly would afford greater deference to lower court judgments than the Court's current approach. Moreover, commentators have noted that the Court historically has treated tax issues differently than other issues of regulatory jurisdiction and has afforded greater deference to legislative judgments than to those reached by juries. However, a closer examination suggests that a fair apportionment review would not be a significant departure from the Court's current jurisprudence. Likewise, as the above discussion illustrates, such a review would produce only modest changes to state punitive damage schemes. Further, an examination of the proffered reasons for treating tax differently and according greater deference to legislative judgments reveals that such reasons may justify greater deference to punitive damage awards than the Court's current approach affords. Finally, a fair apportionment standard of review would address criticisms of the Court's current substantive proportionality jurisprudence.

A. Haslip, Gore *and* Campbell*: A Progression Toward Fair Apportionment Review*

While a fair apportionment approach may appear more deferential than the Court's current approach to punitive damages, such an approach, in fact, would be consistent with the Court's current punitive damage jurisprudence. The Court has recognized previously that states must impose reasonable constraints on punitive damage decision makers. In so doing the

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[203] *See* Colby, *supra* note 16, at 666-77 (arguing that the jury should be limited in its use of third-party transactions, precluded from disgorging profits from third-party transactions and instructed that it is to punish the defendant for the wrong done to the injured party before the court only).

[204] *Campbell*, 538 U.S. at 418.

Court recognized that reasonable constraints must tether the punitive damage decision makers' discretion to the legitimate state interests in imposing punitive damages. For example, in *Pacific Life Insurance Co. v. Haslip*,[205] the Court rejected a pre-*Gore* and pre-*Campbell* due process challenge to Alabama's punitive damage system, in part, because Alabama's pattern punitive damage jury instructions instructed the jury of the purposes for which punitive damages were to be imposed and to take into consideration the character and degree of the wrong and the necessity of preventing a similar wrong in determining an award.[206] The Court concluded that these instructions confined jury discretion to the legitimate state interests in punishment and deterrence.[207] The Court also noted that Alabama instructed the reviewing courts to consider the *Hammond* factors discussed above.[208] The Court concluded that those factors "provide[d] for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter."[209] Thus, the Court adopted a standard approaching a fair apportionment standard—the criteria used to determine a punitive damage award must be reasonably related to the state's interest in punishment and deterrence. However, the Court adopted this standard with little analysis of what constituted the state's interest in punishment and deterrence. In *Gore* and *Campbell*, the Court refined the scope of that state interest in punishment and deterrence. The Court limited the state's interest in punishment and deterrence first to intraterritorial conduct only and ultimately to punishment and deterrence of the conduct directed at the injured party before the Court only. Thus, it seems to follow from *Haslip*, *Gore*, and *Campbell* that procedural constraints must reasonably relate to these narrowed purposes.

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[205] 499 U.S. 1 (1991).

[206] *Id.* at 19.

[207] *Id.* at 21.

[208] *See id.* at 22; *see supra* note 189 and accompanying text.

[209] *Haslip*, 499 U.S. at 22.

Further, as it has in the state taxation of interstate commerce, fair apportionment review would reserve a place for substantive proportionality review. Even if a state's apportionment method appears rationally aimed at calculating the state's apportioned share of an interstate transaction, a court may set aside the tax if the apportionment method produces a share for the state which is greatly disproportionate to the state's actual apportioned share of the value of an interstate transaction.[210] However, the taxpayer bears a heavy burden in demonstrating that the state's apportionment method results in a disproportionate share of value being attributed to the state.[211] Likewise, in the context of punitive damages, fair apportionment review would reserve for the Court a place to set aside awards which grossly exceed an amount necessary to achieve the legitimate goals for which a state may impose punitive damages. In a concurring opinion joined by Justices O'Connor and Souter, Justice Breyer emphasized that awards that are the result of fair procedures are presumptively proportional and that the Court would engage in substantive review only when procedures used imposed "no significant constraints."[212] Thus, at least three Justices have espoused a more limited role for substantive proportionality.

This kind of evolution in the Court's punitive damage jurisprudence would mirror the evolution of the Court's interstate taxation jurisprudence. Initially, the Court applied a substantive proportionality review to interstate tax challenges, setting aside a tax assessment based on the size of the tax base apportioned by the state.[213] However, the Court eventually retreated to its current procedural proportionality review.[214] The Court's entrance into the punitive damage arena is relatively recent when compared to the taxation cases. The Court began reviewing state taxation of interstate enterprises as early as 1931.[215]

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[210] *See supra* note 147 and accompanying text.

[211] *Id.*

[212] BMW of N. Am. v. Gore, 517 U.S. 559, 588 (1996) (Breyer, J., concurring).

[213] *See supra* notes 148-49 and accompanying text.

[214] *See supra* note 150 and accompanying text.

[215] *See, e.g.*, Hans Rees' Sons, Inc. v. N.C. *ex rel.* Maxwell, 283 U.S. 123

In contrast, although the Court rejected a due process challenge to punitive damages in 1885,[216] the Court did not consider a constitutional challenge to punitive damages again until 1988.[217] Further, while its initial decisions have focused on substantive proportionality, *Campbell* indicates some movement toward procedural proportionality. In discussing the role of extraterritorial transactions, the Court explained that extraterritorial transactions are relevant only to show deliberateness or culpability.[218] The Court then cautioned that "[a] jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."[219] This may indicate a willingness to shift to an emphasis on the procedures for imposing punitive damages as a basis for applying the recognized limitations on punitive damages.

Moreover, adopting a fair apportionment approach would produce only modest resultant changes to state punitive damage schemes. Most states employ punitive damage systems similar to the Alabama system employed in *Gore*. Most states permit juries to make the initial determination as to whether to award punitive damages, and if so, in what amount. Many states, either through pattern jury instructions, state statute or common law, instruct the jury to consider factors similar to the *Hammond* factors. For example, many states instruct juries to consider the reprehensibility or culpability of the defendant.[220] Likewise, states instruct juries to consider the relationship between the punitive award and the actual or potential harm.[221] Finally, many states instruct defendants to consider the profitability of the misconduct or the defendant's wealth or financial position.[222] These factors can be easily

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(1931).

[216] *See generally* Mo. Pac. Ry. v. Humes, 115 U.S. 512 (1885).

[217] *See generally* Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71 (1988).

[218] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003).

[219] *Id.*

[220] *See* Janutis, *supra* note 17, at 1470.

[221] *See id.* at 1475.

[222] *See id.* at 1474-75.

modified to produce factors reasonably related to the sanctionabilty solely of the conduct that the defendant directed at the injured party before the court.[223]

Fair apportionment review also would afford the states flexibility to experiment with procedural reforms. For example, some commentators have proposed and at least two states have adopted a total harm rather than apportionment model for punitive damages.[224] That is, these states allow a jury to award punitive damages to punish and deter the entire scope of a defendant's misconduct.[225] These states then credit the defendant for punitive damages previously paid or assessed on some or all of the same misconduct to reduce the risk of duplicative sanctions.[226]

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[223] *See supra* note 185 and accompanying text.

[224] MO. REV STAT. § 510.263 (West Supp. 2005); MODEL PUNITIVE DAMAGES ACT § 10(a) (1996); Howard A. Denemark, *Seeking Greater Fairness When Awarding Multiple Plaintiffs Punitive Damages for a Single Act by a Defendant*, 63 OHIO ST. L.J. 931, 971-74 (2002). Ohio recently enacted legislation prohibiting punitive damages when a defendant previously has paid a judgment or judgments for punitive damages imposed on the same conduct when the aggregate amount of those previously paid judgments exceed Ohio's statutory cap on punitive damages. S.R. 80, 125th Leg. (Ohio 2005), *amending* OHIO REV. CODE ANN. § 2315.21 (LexisNexis 2005). In such circumstances, a plaintiff can recover punitive damages only if the plaintiff introduces evidence of previously undisclosed misconduct or the court finds that the aggregate total of the previous judgments was "totally insufficient" to punish and deter the defendant. *Id.* Although these cases enable the plaintiff to recover punitive damages, the court must credit the defendant for the previously paid judgments.

[225] *See supra* notes 37, 43 and accompanying text.

[226] For example, Missouri currently provides for a credit, with limited exceptions, against a punitive damage verdict for any amounts the defendant has previously paid as punitive damages arising out of the same conduct. MO. ANN. STAT. § 510.263(4) (West 2005). Under the Missouri system, a defendant files a post-trial motion in the trial court, requesting the credit for previously paid punitive damages. *Id.* The defendant then bears the burden of proving that the previously paid punitive damages arose out of the same conduct on which the punitive damage verdict before the Missouri court is based. *Id.* The court must deny the defendant a credit if the court finds that: (1) the prior punitive damage award did not arise out of the same conduct; or (2) the defendant unreasonably continued the conduct after acquiring actual knowledge of the dangerousness of the conduct. The court also may disallow a credit if the court finds that the punitive damage law of the state imposing the prior award materially deviates from Missouri law and that Missouri public policy provides good cause for disallowance in

Under a fair apportionment standard, such credit systems could be upheld even though they lack safeguards to constrain a decision maker's award of punitive damages. A fair apportionment review would allow a court to consider other devices employed by states to alleviate the risk of overlapping sanctions. Like the failure of apportionment in *Goldberg v. Sweet*,[227] the failure of apportionment here could be justified as infeasible. A state could conclude that apportioning punitive damages by transaction with the consumer was illusory. A state could conclude that multiple punitive damages punish the same conduct (the corporate policy) rather than different conduct (the transaction with the consumer). Further, a state could conclude that imposing sanctions on the transactions

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light of the prior court's deviation from Missouri law. *Id.*

Likewise, the Model Punitive Damages Act adopts a credit system. Section 10 of the Model Act provides a credit against a punitive damage award when a defendant "has previously been found liable for punitive damages under a final judgment." MODEL PUNITIVE DAMAGE ACT § 10(a) (1996). The Act allows a defendant to seek a credit in the court where the defendant has been found liable for punitive damages when a prior punitive damage award arose out of the same act or course of conduct upon which the award before the court was based. The court may grant a credit if it determines that the punitive damage award before it is "unfairly duplicative" in light of the previous award. In determining whether an award is unfairly duplicative, a court is to consider the bases for liability, the purposes for which the awards were made, how the awards were calculated, and whether the defendant has already disgorged any unwarranted economic gain. § 10(c).

More pragmatically, the Act also provides for the enforcing state, rather than just the awarding state, to offset punitive damage awards with previously paid awards. Similar to the awarding state credit provision, this provision allows an enforcing state to reduce a punitive damage award sought to be enforced in the state by the amount of punitive damages previously paid if the prior awards were based on the same act or conduct and the enforcing court determines that the judgment to be enforced is unfairly duplicative. Thus, for example, if several plaintiffs receive punitive damage awards in actions in different states (e.g. the states in which each of the plaintiffs reside) then seek to enforce these awards in the same state (e.g. the state in which the defendant has a significant portion of its assets), a court in the enforcing state may offset these awards against each other if the court finds that the awards all arose out of the same conduct and that the awards are unfairly duplicative. § 10(b)-(c), cmt. In determining whether the awards are unfairly duplicative, a court is to be guided by the same factors which guide a court of an awarding state. § 10(c).

[227] 488 U.S. 252, 260-65 (1989).

with other consumers establishing the policy and imposing increased sanctions on the transaction with the consumer before the court, because the other transactions increased the defendant's reprehensibility in the relevant transactions, were, in essence, the same thing.[228] Thus, the state might award damages for the total harm caused by the scope of the misconduct and employ other measures to prevent duplicative sanctions. Further, like the credit system in *Sweet*, the credit system here protects the defendant against the risk of duplicative sanctions.[229]

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[228] *See* Transcript of Oral Argument at 15, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (No. 01-1289); Cordray, *supra* note 15, at 313.

[229] *Goldberg*, 488 U.S. at 264. As a practical matter, the Model Act's provisions provide more protection from duplicative awards. By allowing both the awarding state and the enforcing state to credit a defendant for prior punitive damages, the Model Act better avoids the loophole caused by pending but not final awards. Moreover, the focus on the duplicative nature of the awards as a basis for granting or denying the credit better reflects the apportionment goal behind granting a credit than the public policy exception recognized in the Missouri statute. The focus on the duplicative nature directs a court to consider whether the multiple awards overlap either in intent or as a practical effect. The court must consider the purposes for which the multiple awards have been imposed. Thus, a court may grant a credit against a subsequent award when the prior award was intended to punish the full extent of the defendant's conduct and deter the conduct to the full extent of its harmful effects. Likewise, the court may deny a credit against a subsequent award if a prior award was properly limited to the amount necessary to punish only that portion of the conduct which harmed the imposing state and to deter the defendant from engaging in the misconduct in relation to the imposing state. Similarly, the focus on whether or not the defendant has disgorged any unwarranted economic gain allows the court to deny or grant a credit based on whether as a practical matter the prior award has punished the defendant for its misconduct to the extent it caused harm in both the prior state and the subsequent state and has deterred the misconduct to the extent it harmed both states. Additionally, the credit for duplicative awards alleviates some of the parochial concerns which might hamper the effectiveness of a credit system. A focus on duplicative awards rather than public policy is less susceptible to denial on the basis of parochial concerns for protection of the in-state plaintiff. Moreover, to the extent a court would manipulate the factors determining duplicativeness to benefit parochial interests, the availability of credit in both the awarding state and the enforcing state counterbalances those parochial interests. An enforcing court may be a neutral forum to determine the applicability of a credit provision. To the extent the enforcing court is guided by its own parochial interests, which it may be if the defendant has a significant portion of its assets in the enforcing court, the parochial interests merely counterbalance those of the awarding court.

Likewise, a state could devise a fairly apportioned deterrence-based model for imposing punitive damages. Such a system would instruct juries first to calculate the global harm caused by the entire scope of the defendant's misconduct then estimate the number of successful lawsuits likely to be brought. Finally, such a system would instruct juries to divide the total global harm by the number of likely successful lawsuits and award punitive damages in an amount necessary to make the plaintiff's award equal to the proper proportion of global harm.[230] Such a system, like a credit system, would reduce the risk of duplicative taxation.

B. Legislative Deference v. Judicial Deference

Commentators have noted that the Court has been willing to accord more deference to legislative actions in general, and taxing decisions in particular. One reason suggested for such greater deference stems from the political accountability of legislators and the role that regulated entities play in the legislative process. Indeed, Professor Karlan theorizes that political process theory may explain why the Court has provided greater deference even to criminal sentencing decisions than to punitive damage awards.[231] Karlan opines that because juries in criminal cases are circumscribed by legislative constraints on statutory discretion and by centralized prosecutorial decisions, less judicial oversight may be justifiable.[232] Under this reasoning, state taxation decisions would be entitled to greater deference than punitive damage decisions because a state legislature crafts the state apportionment formula that constrains the state's taxing decisions. Further, an administrative body acting under the ultimate control of the state executive, rather than the jury, applies the formula to the taxpayer. At both levels, decision makers are politically accountable and taxpayers have the opportunity to play a role in the political process.[233]

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[230] *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 593 (1996) (Breyer, J., concurring).

[231] Karlan, *supra* note 51, at 919.

[232] *Id.*

[233] *See* Jerome R. Hellerstein, *Foreword: State Taxation Under the Commerce*

This reasoning is flawed in two respects. It understates the significant constraints legislators currently do impose on punitive damage decision makers. Several states dictate by statute the basis upon which punitive damages may be awarded as well as the factors upon which decision makers can base their determination of the amount of an award.[234] Additionally, as Justice Ginsburg noted in her dissent in *Gore*, many states have imposed other legislative constraints on punitive damage decision makers, including caps on amounts.[235] One need only look at the recent tort reform movement to recognize the role that regulated entities have played in the state political process that has brought about these legislative constraints.[236]

Likewise, it overstates the political accountability of state tax administrators. While the head of a state department of revenue or a state tax commissioner is likely to be a policymaker appointed by a politically accountable executive, individual assessment decisions likely will be made by politically insulated civil servants.[237] Further, assessment decisions

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Clause: An Historical Perspective, 29 VAND. L. REV. 335, 350-51 (1976) (noting the Court's unwillingness to intervene in apportionment cases and arguing "[t]hat these issues ought to be resolved by experts in the field, tax administrators acting under legislative standards, and not by the Supreme Court acting under the vague and general language of brief clauses in the Constitution, is the real meaning behind the heavy burden that taxpayers challenging the validity of state tax apportionment or allocation must carry.").

[234] *See, e.g.*, ALASKA STAT. § 9.17.020(c) (2002); N.J. STAT. ANN. § 2A:15-5.12(b) (West 2000); KAN. STAT. ANN. § 60-3701(b) (1994).

[235] *See Gore*, 517 U.S. at 614-19 (Ginsburg, J., dissenting).

[236] Indeed, contrary to Professor Karlan's contentions, commentators have suggested that political process theory would dictate a greater deference in punitive damage decisions than criminal sentencing decisions because entities subject to punitive damage awards wield political power while criminal defendants as a class are among the politically powerless. *See* Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1301-02 (2000); Susan R. Klein, *The Discriminatory Application of Substantive Due Process: A Tale of Two Vehicles*, 1997 U. ILL. L. REV. 453, 488-89 (1997).

[237] For example, the Ohio Commissioner of the Department of Taxation is vested with the authority to make tax assessments. OHIO REV. CODE ANN. §§ 5703.05-.11 (LexisNexis 2004). The Tax Commissioner is appointed by the Governor. § 5703.07. However, the Tax Commissioner may appoint agents to make

generally will be susceptible to review by a politically insulated board of tax appeals and ultimately subject to judicial review. Thus, application of the legislatively derived apportionment formula will likely be fairly well insulted from the political process.

Meanwhile, in the punitive damage context, a politically insulated jury will generally will apply the legislatively derived punitive damage scheme. However, in many instances, the jury application will be reviewed by courts that are politically accountable. Thirty-eight states select supreme court justices by popular election, and 86% of state judges must stand for election in some form.[238] Recent reports indicate increased efforts by interest groups and political action committees, including those representing the interests of entities subject to punitive damage awards, to influence judicial elections and elect judges sympathetic to the interests of their members.[239] Moreover, in a survey of elected judges conducted in 2001 and 2002 by the

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assessments. *See id.* Those agents are entitled to civil service protection.

[238] DEBORAH GOLDBERG & SAMANTHA SANCHEZ, JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2002: HOW THE THREAT TO FAIR AND IMPARTIAL COURTS SPREAD TO MORE STATES IN 2002, at 3 (Bert Brandenburg ed., Brennan Center for Justice & Institute on Money in State Politics 2002); *see also* Steve Inskeep, *Analysis: US Champber of Commerce Becomes a Powerful and Often Secret Force in Election Campaigsn*, (NPR Morning Edition, Oct. 7, 2004).

[239] Mike France, Lorraine Woellert & Brian Grow, *The Battle Over the Courts: How Politics, Ideology and Special Interest Are Compromising the U.S. Justice System*, BUS. WK., Sept. 27, 2004, at 36 ("[S]pecial interests are increasingly turning to the courts to advance goals they can't win legislatively. So the U.S. Chamber of Commerce, frustrated in its attempts to pass meaningful state or federal tort reform, has spent an estimated $50 million on judicial races since 1998, while plaintiffs' lawyers fight back with multimillion-dollar war chests of their own. . . . The list of organizations that have jumped into America's judicial wars is long and growing. Generally, they fall into two broad categories. In one, partisans battle over tort reform. The U.S. Chamber of Commerce; big companies such as Home Depot, Wal-Mart Stores, and American International Group; and some small businesses are in one camp. Plaintiffs' law firms and the Association of Trial Lawyers of America make up the other. These two sides focus largely on state judges, who hear the majority of big product-liability and consumer-protection cases that make Wall Street shudder."); Inskeep, *supra* note 238 (reporting that the U.S. Chamber of Commerce is "expected to spend tens of millions of dollars in an effort to elect sympathetic judges and attorneys general in about 25 states" in 2004).

Justice at Stake Campaign, 4% of the surveyed judges reported that campaign contributions had "a great deal of influence" over their decisions, 22% indicated that contributions had "some influence" over their decisions, and 20% said contributions had "just a little influence" over their decisions.[240] Only 36% of the judges indicated that contributions had "no influence at all" over their decisions.[241] Thus, though not identical to the political influence exerted over state tax commissioners, entities subject to punitive damages wield some political influence over judges reviewing punitive damage awards.[242]

One may argue that the Court has afforded deference to state taxation decisions as part of its robust defense of federalism. Since taxation is an area of traditional state power, the Court has deferred to state regulation of this area. However, states impose punitive damages to sanction and deter tortious conduct, another area of traditional state power. Indeed, one of the criticisms of *Gore* and *Campbell* leveled by the dissenting Justices and frequently leveled by commentators is that the Court's substantive proportionality review improperly invades an area of traditional state regulation.[243]

One may argue more pragmatically, that the Court's deference to state taxation decisions arises from a desire to protect a source of state revenue. While punitive damage awards traditionally have not been a source of state revenue, the rise of extraction statutes suggests this view may be changing.[244] Indeed, Governor Schwarzenegger recently proposed to raise $450 million dollars for California by confiscating 75% of all punitive damage awards awarded by California juries.[245]

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[240] France, Woellert & Grow, *supra* note 239.

[241] *Id.*

[242] I do not mean to suggest that the rise of such influence is a positive development as a normative matter. A discussion of whether a politically accountable judiciary is good or bad is beyond the scope of this paper. I merely intend to recognize that—good or bad—such influence exists.

[243] *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 607 (1996) (Ginsburg, J., dissenting) ("The Court, I am convinced, unnecessarily and unwisely ventures into a territory traditionally within the States' domain. . . .").

[244] *See* Sharkey, *supra* note 13, at 376-77.

[245] Adam Liptak, *Schwarzenegger Sees Money for State in Punitive Damages*,

Finally, fair apportionment review would dispel some of the criticism leveled at the Court's current substantive proportionality review. In dissenting opinions in *Gore* and *Campbell*, Justices Ginsburg and Scalia criticized the substantive proportionality test as constituting nothing more than the Court's subjective judgment of proportionality.[246] Both Justices Ginsburg and Scalia contended that the *Gore* guideposts provided no guidance to lower courts as to what would constitute a disproportionate award.[247] Justice Ginsburg also complained that the Supreme Court would bear the sole burden of policing state punitive damage judgments under *Gore*.[248] Critics have assailed the Court's substantive proportionality review as subjective and providing no guidance.[249]

N.Y. TIMES, May 30, 2004.

[246] *See, e.g.,* State Farm Mut. Auto Ins. Co. v. Campbell, 530 U.S. 408, 429 (2003) (Scalia, J., dissenting) ("I am also of the view that the punitive damages jurisprudence which has sprung forth from *BMW v. Gore* is insusceptible of principled application"); *Gore*, 517 U.S. at 600 (Scalia, J., dissenting) ("Today's decision, though dressed up as a legal opinion, is really no more than a disagreement with the community's sense of indignation or outrage expressed in the punitive award of the Alabama jury, as reduced by the State Supreme Court."); *id.* at 613 (Ginsburg, J., dissenting) (The Court "has only a vague concept of substantive due process, a 'raised eyebrow' test as its ultimate guide.").

[247] *See, e.g., Gore*, 517 U.S. at 605 (Scalia, J., dissenting) ("Of course it will not be easy for the States to comply with this new federal law of damages, no matter how willing they are to do so. In truth, the 'guideposts' mark a road to nowhere; they provide no real guidance at all.); *id* at 606 ("The Court has constructed a framework that does not genuinely constrain, that does not inform state legislatures and lower courts—that does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not 'fair.'").

[248] *See Gore*, 517 U.S. at 613 (Ginsburg, J., dissenting).

[249] *See, e.g.,* Karlan, *supra* note 51, at 882-83 ("The problem lies in translating the [proportionality] principle into a standard for judicial oversight. For all the Court's invocation of objective factors, it turns out that a key aspect of proportionality review remains fundamentally subjective. Unless they are prepared to adopt a mechanical rule, appellate courts can do little more than 'prick the lines,' and even those lines do little to create a clear pattern for other actors to follow."); Bruce J. McKee, *The Implications of* BMW v. Gore *for Future Punitive Damages Litigation: Observations from a Participant*, 48 ALA. L. REV. 175, 176 ("[Professor John] Coffee adds that the ruling will probably not 'create very uniform law in any of the states' because each punitive damages case is unique and the United States Supreme Court can review only a tiny percentage of such cas-

Fair apportionment review would address this criticism by providing some objective criteria and guidance. Because most states employ similar systems for imposing punitive damages, review of one state's procedures would provide guidance with respect to the remaining states' procedures. As such, fair apportionment review also would reduce the need for Supreme Court intervention.

V. CONCLUSION

The Court has imposed similar limitations on state punitive damage awards and state taxation of interstate transactions. In both areas, the Court has prohibited extraterritorial reaching by states and duplicative burdens. Also, the Court has recognized that a tax or sanction must be reasonably related to the state's legitimate interest. Both types of state regulation raise similar problems in applying these limitations. In each area, however, the Court has taken a different approach to resolving these issues. In the punitive damage area, the Court has focused on the size of an award as a measure of state overreaching in violation of these limitations. In contrast, in the state taxation realm, the Court has taken a fair apportionment approach to applying these limits. The Court has eschewed reliance on the size of a tax base as a measure of state overreaching and instead focused on the state's method of apportionment. The Court has required only that the method for determining the state's share of taxable value rationally relate to the state's interest in the taxing value generated within the state. Further, where a state has failed to successfully apportion value, the Court has looked at other measures the state has taken to alleviate the risk of duplicative taxation. A fair

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es." (quoting Henry J. Reske, *Guidelines Instead of Bright Lines: State Rulings on Punitives Unlikely to be Uniform Despite High Court Guidance*, A.B.A.J. (July 1996); Neil B. Stekloff, Note, *Raising Five Eyebrows: Substantive Due Process Review of Punitive Damage Awards After* BMW v. Gore, 29 CONN. L. REV. 1797, 1798 (1997) ("Because each of the 'guideposts' is based on almost entirely subjective and malleable factors, the Supreme Court's 'test' in *BMW v. Gore* amounts to essentially an "ad hoc determination that this particular award of punitive damages was not 'fair.'" (quoting *Gore*, 517 U.S. at 606 (Scalia, J., dissenting))).

apportionment approach to regulation of punitive damages consistent with the Court's fair apportionment approach to state taxation of interstate enterprises would more effectively balance the competing goals of protecting a state's legitimate interest in imposing punitive damages while limiting the extraterritorial impact of such damages and protecting a defendant from duplicative sanctions. Further, little reason exists for the Court's differing approaches to the forms of state regulation. Therefore, the Court should adopt a fair apportionment standard of review for punitive damage awards.

THE FEDERALIST AND THE LESSONS OF ROME

Louis J. Sirico, Jr.[*]

PRECIS

Since the time of the Constitution's framing, our intellectual canon has shifted so that the classical era is no longer central to our learning. This shift may impede our understanding of the Framers and their work. We may fail to grasp a historical analogy and, even more, fail to appreciate the full meaning of a core document in our history.

This Article assists today's reader in gaining the knowledge necessary for an informed understanding of *The Federalist*'s references to ancient Rome. The Article explains each significant reference to Rome by providing a richly textured historical background for the reference. The four primary themes are the need for a national government, the need for a single executive, the best way to structure a government, and the need for a standing army. The Article concludes by discussing three issues: were these classical references persuasive to Publius' readers, what do the references tell us about how the Framers viewed ancient Rome, and in light of our fading familiarity with the classical era, on what political references do modern commentators rely.

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I. INTRODUCTION

In *The Federalist*, John Jay, Alexander Hamilton, and James Madison wrote to persuade their readers to support ratification of the proposed Constitution.[1] In the eighty-five newspaper essays that comprise *The Federalist*, they attempted to explain the wisdom of every provision of the Constitution and defend the document against every criticism. In the first of these papers, Hamilton, sets out their purpose:

> I propose, in a series of papers, to discuss the following interesting particulars . . . *The utility of the UNION to your political prosperity* . . . *The insufficiency of the present confederation to preserve that Union* . . . *The necessity of a government at least equally energetic with the one proposed, to the attainment of this object* . . . *The conformity of the proposed constitution to the true principles of republican government* . . . *Its analogy to your own state constitution* . . . and lastly, *The additional security, which its adoption will afford to the preservation of that species of government, to liberty and to prosperity.*[2]

In making the argument, Publius, the collective pen name of the three coauthors, draws lessons from experiences of other countries, including the classical civilizations. For example, a glance at an index to *The Federalist* would lead to fourteen references to Rome and eleven to Greece.[3]

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[1] *See* BERNARD BAILYN, TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICAN FOUNDERS 100-25 (2003) (arguing that the authors of *The Federalist* were writing "not a theoretical treatise on political philosophy but a practical commentary on the uses and misuses of power . . ." RICHARD B. BERNSTEIN, ARE WE TO BE A NATION?, 230-42 (Harvard Univ. Press 1987) (recounting the history of *The Federalist*).

[2] THE FEDERALIST No.1, at 6 (Alexander Hamilton) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961). There is some disagreement over the numbering system and the authorship of some of the papers. This Article follows the numbering system and the attributions of authorship used in the Cooke edition. For a discussion of these controversies, see *id.* at xiv-xxx.

[3] *See id.* at 664, 699 (listing the pages for these references in the index to the book).

Newspaper readers of that day apparently would easily understand these references.[4] However, the modern reader would find most of them quite obscure. Except for classicists, few modern readers, for example, would know about the dictatorship of the Rome decemvirs or the popular assemblies of republican Rome, such as the Comitia Centuriata and Comitia Tributa.

Since the time of the Constitution's framing and ratification, our intellectual canon has changed. In that earlier era, for example, readers would have understood why the authors of *The Federalist* would have chosen the pseudonym of Publius. The pen name was a reference to Publius Valerius, known to the Roman people as "Publicola" (lover of the people) who helped found the Roman Republic after the overthrow of the Tarquinian line of kings.[5] Today, few readers would appreciate the reference. Ancient history is no longer central to American education and culture.[6]

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[4] *See infra* notes 50-55 and accompanying text.

[5] *See* BERNSTEIN, *supra* note 1, at 231. Hamilton had adopted the pseudonym for three letters to newspapers that he had written in 1778 attacking Samuel Chase of Maryland for disclosing a Congressional secret plan in order to turn a personal profit. *See* Letters from Alexander Hamilton to the New-York Journal and the General Advertiser (Oct. 16, 1778, Oct. 26, 1778, Nov. 16, 1778) *reprinted in* THE PAPERS OF ALEXANDER HAMILTON, 1768-1778, at 562, 567, 580 (Harold C. Syrett ed., Columbia Univ. Press 1961).

[6] On the centrality of classical history in the era of the Framers, see FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 5 (Univ. Press of Kansas 1985).

> [M]ost of the Framers were versed in the history of Greece and Rome, of confederations and republics, and of England at least since Elizabethan times. Moreover, most of them thought historically and used references to history to support or illustrate their reasoning. During the first three weeks of the [Constitutional] convention, for instance, delegates buttressed their arguments with historical examples at least twenty-three times, not counting references drawn from British or colonial or recent American history, inclusion of which would treble that total. John Dickinson, Pierce Butler, Benjamin Franklin, George Mason, James Madison, James Wilson, Alexander Hamilton, and Charles Pinckney delivered to their colleagues mini lectures and lectures that sometimes lasted for several hours on the lessons to be drawn from ancient or modern history.

The shift in the American canon may impede our understanding of the Framers and their work. A lack of information may result in more than failing to grasp an analogy buried in an essay. To understand a historical analogy fully, the reader needs historical context. Otherwise, the reader may discern the essence of the analogy, but fail to appreciate its full meaning. For example, in reading *The Federalist No. 70*, the reader might puzzle over this sentence: "The decemvirs of Rome, whose name denotes their number,[] were more to be dreaded in their usurpation than any ONE of them would have been."[7] By reflecting on the surrounding sentences, the reader might determine that Hamilton is arguing in favor of having a single executive, rather than several executives sharing power, because he believes that a multiple executive is more likely to be enticed into tyranny than a single executive. If the reader knows nothing of Roman history, he or she may surmise that the decemvirs were a group of leaders similar to a multiple executive. However, if the reader enjoyed a deeper understanding of history, he or she would know that in the fifth century, B.C.E. (before the common era), the patricians capitulated to the plebeians' demand for a codified law that would rein in the discretion of the patricians in administering law.[8] The patricians appointed ten men, the decemvirs, to draft the laws and to exercise complete power over the state for the one year it would take to complete the task. However, after one year, the decemvirs succeeded in gaining another year in which to complete the project. After the second year, the decemvirs still did not relinquish their power. Eventually a scandal forced them out. A reader who has the knowledge or, better yet, knows an even more complete version of this story could fully understand Hamilton's argument: Even officials appointed to assume civic

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Id. An index to James Madison's Notes of Debates in the Federal Convention of 1787 leads to eighteen explicit references to Rome and five to Greece. JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787, at 666, 673 (Adrienne Koch ed., 1966) [hereinafter MADISON'S NOTES].

[7] THE FEDERALIST No. 70 (Alexander Hamilton), *supra* note 2, at 479 (citation omitted).

[8] For an extensive account of these events, see *infra* Part IV.B.

responsibility for an important task can be tempted into becoming tyrants.

As another example, a modern reader of *The Federalist No. 41* would encounter this statement: "Not less true is it, that the liberties of Rome proved the final victim to her military triumphs."[9] From these words, the reader might discern that Madison fears the interference of the military in civic affairs. The surrounding sentences might disclose that the particular issue is whether the proposed Constitution was prudent in authorizing a standing army.[10] As a proponent of the Constitution, Madison has to argue that despite the dangers of a standing army, it is necessary for self defense and that the Constitution provides a check on military power by allowing Congress to appropriate revenues to support the army for a term of no longer than two years.[11] However, only with knowledge of Roman history can the reader understand why Madison's contemporaries would view a standing army with great trepidation: Rome's standing army became such a powerful force that it installed and murdered emperors with some regularity.[12]

This Article seeks to assist today's reader in gaining the historical context necessary for an informed understanding of *The Federalist* and its references to ancient Rome. The Article explains each significant reference to Rome with a richly textured historical background for the reference.

The Article begins with a brief outline of the history of republican Rome, the era to which Publius makes most of his

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[9] THE FEDERALIST No. 70 (Alexander Hamilton), *supra* note 2, at 271.

[10] *See* U.S. CONST. art. I § 8 ("Congress shall have Power . . . [t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; . . .").

[11] *See id.* At the Constitutional Convention, Madison supported an unsuccessful motion by George Mason to preface the clause authorizing Congress "[t]o provide for organizing, arming, and disciplining, the Militia" with the words, "[a]nd that the liberties of the people may be better secured against the danger of standing armies in time of peace." U.S. CONST. art. I § 8; MADISON'S NOTES, *supra* note 6, at 639. The motion failed, perhaps because of Gouverneur Morris' concern that the motion would set "a dishonorable mark of distinction on the military class of Citizens." MADISON'S NOTES, *supra* note 6, at 639.

[12] For an extensive discussion of these events, see *infra* Part V.

Roman references. The outline gives the reader enough history to follow the discussion that follows. The Article then organizes the Roman references under four arguments that Publius makes: the need for a national government, the need for a single executive, the best way to structure a government, and the need for a standing army. The Article concludes by discussing the extent to which these classical references were persuasive to Publius' readers, what the references tell us about how the Framers viewed Roman history, and, in light of our fading familiarity with classical Rome, on what political references do modern commentators rely.

II. THE ROMAN REPUBLIC: A HISTORICAL OUTLINE

As might be expected, the history of Rome's early years depends more on legend than on verifiable fact.[13] Rome's story begins on the Latium plain along the Tiber river. In ancient times, the city of Alba Longa boasted a line of kings that extended back to Anaeas, the Trojan hero. In the eighth century, B.C.E., Amulius usurped the throne of his elder brother Numitor. However, Rhea Silva, Numitor's daughter, then had twins, fathered by Mars. The twins, Romulus and Remus were placed on a raft, which eventually landed on shore. The twins were then raised by a she-wolf. When they came of age, they killed Amulius, restored Numitor to the throne, and set out to found their own city.

In 753, Romulus quarreled with his brother and killed him. He then proceeded to build the city of Rome. After Romulus' death in 717, the city was ruled by a series of kings, ending with the line of Tarquinian kings. The line ended when Lucius Tarquinius (Superbus) turned the kingship into an absolute monarchy and, as a result, was deposed by the patricians, led by Lucius Junius Brutus.

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[13] In this article, the accounts of Rome rely on standard, uncontroversial history. Thus, to document every statement with a citation would be unnecessary and a bit comical. Standard histories include RAYMOND BLOCH, THE ORIGINS OF ROME (Praeger Publ'g 1960); ARTHUR E.R. BOAK, A HISTORY OF ROME TO 564 A.D. (Macmillan Co. 3d ed. 1943); MARCEL LE GLAY ET AL., A HISTORY OF ROME (Blackwell Publ'g 1997); LIVY, THE RISE OF ROME: BOOKS 1-5 (T. James Luce trans., Oxford Univ. Press 1998); CHARLES MERIVALE, A GENERAL HISTORY OF ROME (Harper & Bros. 1879); CHESTER G. STARR, THE ANCIENT ROMANS (Oxford Univ. Press 1971); J. WELLS, A SHORT HISTORY OF ROME TO THE DEATH OF AUGUSTUS (Barnes & Noble 1963).

With the end of the Tarquinian line in 509, the republican era began, and its political structure gradually took shape. In addition to the patrician senate, all Romans belonged to another assembly, the patrician-dominated Comitia Centuriata; however, the senators effectively exercised a veto power over its decisions. Among its other functions, this assembly appointed two consuls to head the state and the army. Each consul could veto the proposals of the other. Not until 367 could a plebeian hold this office.

After several class conflicts between the patricians and plebeians, the plebeians gained permission to elect tribunes who would represent them before the senate and consuls and who would have the power to veto any law that the consuls proposed.

The plebeians also demanded the security of a written code of laws, and in 451 ten men, the decemviri, were chosen to write the code. While completing the project, they would enjoy absolute political power. The decemviri codified Roman customary law on twelve tablets. However, when they finished their work, they refused to relinquish their political power until they were forced to resign. Still, during the life of the Republic, conflicts between patricians and plebeians continued with the patricians generally continuing to dominate.

During the ensuing centuries, Rome conquered Italy and many foreign lands. Perhaps the most notable military events were the three Punic Wars against Carthage,[14] the African city and Mediterranean trading empire. At the end of the third war, the Romans demolished Carthage and ploughed salt into the ground to prevent it from rising again.

Intertwined with the Second Punic War was Rome's struggle with the Hellenistic Empires. Philip V. of Macedon had allied himself with Carthage. Afterward, he refused to agree to stop seizing Greek territories, and in 196, the Romans quickly defeated him. Meanwhile, Antiochus III of the Seleneid Empire continued his aggressions against the Greek cities until, in 189, he also met defeat at the hands of the Romans. However, Philip's successor, Perseus, then became active in Greece, only to meet the same fate as Antiochus.

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[14] The Punic Wars took place in 264-41, 218-02, 149-46 B.C.E. respectively.

Particularly after the Second Punic War and the Macedonian wars, the divide between rich and poor increased dramatically. The growing conflict came to a head in 133 when Tiberius Gracchus became a tribune and proposed massive land reform. His efforts led to political conflict and ultimately to a riot in which a group of senators clubbed him to death. In 124, his brother Gaius was elected tribune and also attempted to implement reforms. Although he met with some success, the resulting conflicts ended in bloodshed and Gaius' death .

The ensuing years brought a war in Africa, an attempted invasion by German tribes, and civil war in Italy. Marius and Sulla, two popular generals, became political rivals and, with their military forces backing them, took turns controlling Rome and slaughtering those who opposed them. Rome was left with a corrupt government.

The Republic ended with the rise of Julius Caesar. In the early years of his political career, Caesar joined forces with Pompey, another military hero, and Crassus, also a military leader and an extremely wealthy man. While Caesar was away from Rome, conquering the Gauls and Germans, Pompey remained in the city consolidating political power. Meanwhile, Crassus was killed while fighting the Parthians in Spain.

Pompey and Caesar were now rivals. When Caesar returned from Gaul, Pompey had withdrawn to mobilize his troops. After compelling the Senate to declare him dictator, Caesar pursued and defeated Pompey. When Caesar eventually returned, he restored order, and in 44, became dictator for life. Yet, within five months, he was assassinated by senators who hoped for a return to the Republic and patrician power.

By 29, Caesar Augustus (formerly named Octavian), the grandson of Caesar's sister and Caesar's adopted son, had conquered all rivals. Although he retained the republican governmental institutions, at least nominally, he had initiated the era of the Roman Empire.

III. THE NEED FOR A NATIONAL GOVERNMENT

In arguing against continuing a loose confederation of states and establishing a vital national government, Jay, Hamilton, and Madison looked to Roman history for examples of the dangers of a confederacy. They argued that: (1) confederation members inevitably end up in conflict, (2) these conflicts can result in anarchy, and (3) confederations increase the risk of individual members forging foreign alliances that could lead to foreign domination.

A. *The Inevitability of Internal Disputes: Rome's Conflicts With Its Neighbors*

> To look for a continuation of harmony between a number of independent unconnected sovereignties, situated in the same neighbourhood, would be to disregard the uniform course of human events, and to set at defiance the accumulated experience of the ages. . . . The genius of republics (say they) is pacific; the spirit of commerce has a tendency to soften the manners of men and to extinguish those inflammable humours which have so often kindled into wars. Commercial republics, like ours, will never be disposed to waste themselves in ruinous contentions with each other. They will be governed by mutual interest, and will cultivate a spirit of mutual amity and concord.
>
> . . .
>
> Sparta, Athens, Rome and Carthage were all Republics; two of them, Athens and Carthage, of the commercial kind. Yet were they as often engaged in wars, offensive and defensive, as the neighbouring Monarchies of the same times. Sparta was little better than a well regulated camp; and Rome was never sated of carnage and conquest.
>
> Carthage, though a commercial Republic, was the aggressor in the very war that ended in her destruction. Hannibal had carried her arms into the heart of Italy and to the gates of Rome, before Scipio, in turn, gave him an overthrow in the

> territories of Carthage and made a conquest of the Commonwealth.
>
> . . .
>
> From this summary of what has taken place in other countries, whose situations have borne the nearest resemblance to our own, what reason can we have to confide in those reveries, which would seduce us into an expectation of peace and cordiality between the members of the present confederacy, in a state of separation?[15]

Here, Hamilton argues for a unified government, and expresses his skepticism about the pacific instincts of the current confederation of states. According to Hamilton, a nation (or state) is inevitably drawn into conflict with its neighbors. Moreover, even though states are not ruled by monarchs, their current governmental structures will not lessen the chances of hostility among them. As history shows, even republics are prone to falling into conflict with their neighbors. A united American republic, on the other hand, will encourage peace among the states far better than would the present confederation.

Ancient Rome could chronicle a long history of conflict with its neighbors.[16] Shortly after the destruction of the monarchy in 509, Rome concentrated not only on creating the new republic, but also on conquering its Italian neighbors. In fact, during the first one hundred years of the Republic, almost every summer witnessed a Roman military campaign against its Italian neighbors. For instance, in 396, Rome laid siege to the Etruscan city of Veii. This struggle between the Romans and Etruscans was constant in Rome's first centuries. By 275, the Romans exercised control over the entire Italian peninsula, with its northern border at the Po Valley. Moreover, this Roman expansion was achieved more by its military resources than its diplomatic efforts.

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[15] THE FEDERALIST No. 6 (Alexander Hamilton), *supra* note 2, at 28, 31-32, 34-35. At the Constitutional Convention, James Wilson of Pennsylvania spoke in favor of preserving the state governments by noting that "[a]ll large governments must be subdivided into lesser jurisdictions." MADISON'S NOTES, *supra* note 6, at 151-52. In replying, Hamilton agreed on preserving the states, but insisted that their governments should be subordinate to the national government. He noted the concern that he later expressed in *The Federalist No. 6*: "The examples of Persia [and] the Roman Empire . . . were he thought in favor of his doctrine: the great powers delegated to the Satraps [and] proconsuls, having frequently produced revolts, and schemes of independence." MADISON'S NOTES, *supra* note 6, at 152.

[16] For a discussion of these events, see LE GLAY, *supra* note 13, at 72-80, 105-06, 115-20, 125-26; LIVY, *supra* note 13, at 322-41; MERIVALE, *supra* note 13, at 51; H.H. SCULLARD, A HISTORY OF THE ROMAN WORLD: 753 TO 146 BC, at 210-11 (Routledge 1980); STARR, *supra* note 13, at 72-85.

Yet Rome itself did not remain unscathed in the early years of the Republic. For years, Gallic barbarians were moving out of their homelands in central Europe and into areas like France, Spain and Britain. When they reached the Po Valley, they began to raid Italian lands, traveling as far as central Italy. Rome sent out an army to quell this threat, however, the force faced annihilation at the Allia river. The Gauls continued their march south and, in 392, sieged and sacked Rome. The city itself was almost completely destroyed, and the Gauls left only after being pushed out by Camillus, a Roman patrician, who was elected emergency dictator by the curiate assembly.

This near disaster, however, failed to deter Roman bellicosity. Instead, warfare became a part of Roman culture, and it was rare for a year to go by without Rome engaging in a war. The doors of the temple of Janus, erected by Numa Pompilius, were to be closed whenever Rome was at peace. However, those doors were closed for only two short periods during the Republican Era: in 24, after the consulship of Manlius following the First Punic War, and in 29, under the reign of Caesar Augustus at the end of the Republican Era.

As Rome's domination over Italy became unassailable, Rome began to look abroad for new foes. During the age of the Republic, Rome would engage in military campaigns against virtually every civilization bordering the Mediterranean Sea. By 54, Roman military ambition had reached as far north as southern Britain.

Among the most famous of Rome's many military campaigns were its wars against its neighbor Carthage in North Africa, in present-day Tunisia. Over the course of 120 years, Rome and Carthage would engage in three costly wars known as the Punic Wars. The First Punic War was sparked in 264, when the Mamertines, a group of Italian mercenaries, invaded the island of Sicily. The Sicilian authorities requested aid from both Carthage and Rome. Carthage agreed to come to the rescue of the Sicilians; however, the Romans felt that their loyalties rested with the Mamertines and supported them. Inevitably, Rome started a war with the Carthaginians, and in 241, Roman naval forces decisively defeated Carthaginian forces at the Aegates Islands.

By 226, Carthage had attempted to expand its empire by establishing a strong foothold in Spain. In that year, Rome imposed a limitation on Carthaginian eastward expansion in Spain by setting the boundary of Carthage's expansion at the Ebro River. Hannibal, the Carthaginian general in Spain, was angered by this Roman imposition. In 219, he attacked the city of Saguntum, which was an ally of Rome. Despite pleas from Saguntum, Rome did not come to its aid and after an eight-month siege, the city fell to the Carthaginians. After the fall of Saguntum, Rome sent ambassadors to Spain demanding the surrender of Hannibal. However, Carthage would not acquiesce to this demand, and in 218, the Second Punic War officially commenced.

The early stages of the war went very badly for Rome, as Hannibal brought his army and war elephants through the Alps and into Italy in their famous march. However, in 216, the war would reach its most devastating point for Rome when Hannibal annihilated the Roman army at Cannae in Eastern Italy. In the course of the battle 25,000 Romans were killed, and 10,000 were captured, including one Roman consul, Terentius Varro. The other Roman consul, Aemilius Paullus, was among the dead at Cannae. Thus, in the course of this one battle, Rome lost both its high magistrates and the army on which it depended to defend the Italian peninsula. However, Carthaginian fortunes soon turned as the young Roman general, Scipio Africanus, launched a campaign on Carthage itself, and in 202, defeated Hannibal at Zama. This Roman victory forced Carthage to once again surrender to Rome and pay the reparations of 10,000 gold talents, as well as surrender all their war elephants and disassemble their navy.

The Roman-Carthaginian hostilities, however, did not end in 202. Many Romans maintained that insuring a lasting peace required the destruction of Carthage. The most notable advocate of this position was Cato the Elder, who after every speech before the Senate proclaimed, "Carthage must be destroyed."[17] This view gained popular acceptance in Rome, and the Romans began to seek armed conflict with Carthage and its African neighbors. In 149, the two republics commenced their third war and, after the city of Carthage fell, Roman forces razed the city to the ground and salted the earth to make the land uninhabitable.

Rome's conflicts were not limited to conquest or self-defense; bouts of civil war also inflicted carnage on the populace. The Roman Social War, which lasted from 91 to 88, and the conflicts that followed serve as excellent examples of the Roman penchant for civil war. The Social War was a result of years of non-Roman Italians being dissatisfied with their status as quasi-citizens of Rome. The various inhabitants of Italy were granted some of the benefits of Roman citizenship, but did not enjoy the full benefits of complete citizenship. In 91, Livius Drusus, a Roman demagogue, suggested that all Italians should receive Roman citizenship. As a result, he was assassinated, and his proposal was rejected by the Senate. These events sparked a revolt amongst the Italian tribes of the Samnites and the Marsi, and Cornelius Sulla and Gaius Marius set out with Roman legions to pacify the rebels.

Although these two generals were able to quell the insurrection, they nevertheless would do more harm than good for the republic through their competition with one another. In 88, Sulla was elected consul and received the command of a Roman army to fight Mithradates in Asia. While Sulla was away on campaign, Marius seized control of Rome and had some of Sulla's allies killed. Marius then died, leaving his supporters in power. In 83, Sulla returned from the east and set about placing Rome back under his rule. Sulla took his army and marched on Rome where, in a vicious battle outside the Colline Gate of Rome, Sulla defeated the forces of Marius' followers and regained control of the city. Sulla then proclaimed himself dictator of Rome and compiled a list of names of those who were disloyal to him during his absence. These lists, known as proscriptions, awarded monetary sums to those who presented Sulla with the heads of those who had been proscribed. In 78, Sulla died, and the republic briefly returned to the governmental form it possessed prior to 88.

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[17] STARR, *supra* note 13, at 38-39.

Very shortly afterward, Gaius Julius Caesar, a young general and politician, would once again plunge Rome into civil war. Caesar had a falling-out with his co-ruler and one-time friend Pompey the Great (Gnaeus Pompeius Magnus). In response, Pompey secured a decree of martial law and had himself declared sole-consul. Meanwhile, Caesar was stationed in Gaul in charge of an army and he was aware that he would be subject to prosecution in Rome for the illegal passage of legislation when he was consul in 59. In order to avoid this fate, Caesar instead mobilized his army and led them across the Rubicon River, which separated Cisalpine Gaul from Italy. By bringing his armed soldiers out of Gaul and into Italy without permission, Caesar had declared war on the government. Caesar quickly destroyed the opposition he met in Italy and forced Pompey to flee to Greece. In 48, at Pharsalus in Thessaly, Caesar defeated Pompey's forces in battle and caused Pompey to flee to Egypt. Pompey was subsequently assassinated by agents of King Ptolemy XIII of Egypt, an ally of Caesar's.

The civil war, however, did not end with the death of Pompey and the appointment of Caesar as dictator. Caesar then began chasing the children of Pompey and their armies across the Mediterranean basin. In 46, Caesar took his army to North Africa, where they defeated the remnants of Pompey's followers on the battlefield at Thapsus. The survivors fled to Spain where Caesar won a decisive victory against the Pompeians at the battle of Munda, effectively ending the civil war and allowing Caesar to return to Rome and rule until his assassination in 44.

In *The Federalist No. 6*, Hamilton warns that neighboring states tend to enter into conflict. He suggests that in order to avoid such disaster in the new nation, the states should not continue as a confederacy, but should form a union, effectively subjecting all the States to one government and decreasing the chances of war among them. As Hamilton argues, conflicts were common with Rome and its neighbors. Nonetheless, Hamilton ignores the Roman republic's propensity to fall into civil wars as well as external wars. This problem of civil war would come to divide the United States less than a century later.

B. The Threat of Anarchy Among Confederation Members: The Macedonian War

> Had Greece, says a judicious observer on her fate, been united by a stricter confederation, and persevered in her Union, she would never have worn the chains of Macedon; and might have proved a barrier to the vast projects of Rome.
>
> . . .
>
> Philip, who was now on the throne of Macedon, soon provoked, by his tyrannies, fresh combinations among the Greeks. The Achaeans, though weakened by internal dissentions, and by the revolt of Messene one of its members, being joined by the Etolians and Athenians, erected the standard of opposition. Finding themselves, though thus supported, unequal to the undertaking, they once more had recourse to the dangerous expedient of introducing the succour of foreign arms. The Romans to whom the invitation was made, eagerly embraced it. Philip was conquered: Macedon subdued. A new crisis ensued to the league. Dissentions broke out among its members. These the Romans fostered. Callicrates and other popular leaders, became mercenary instruments for inveigling their countrymen. The more effectually to nourish discord and disorder, the Romans had, to the astonishment of those who confided in their sincerity, already proclaimed universal liberty throughout Greece. With the same insidious views, they now seduced the members from the league, by representing to their pride, the violation it committed on their sovereignty. By these arts, this Union, the last hope of Greece, the last hope of antient liberty, was torn into pieces;

> and such imbecility and distraction introduced, that the arms of Rome found little difficulty in compleating the ruin which their arts had commenced. The Achaeans were cut to pieces; and Achaia loaded with chains, under which it is groaning at this hour.
>
> I have thought it not superfluous to give the outlines of this important portion of history; both because it teaches more than one lesson and because, as a supplement to the outlines of the Achaean constitution, it emphatically illustrates the tendency of foederal bodies, rather to anarchy among the members, than to tyranny in the head.[18]

In *The Federalist No. 18*, Madison recounts events occurring in Greece in the third and second centuries B.C.E.[19] His purpose is to demonstrate that confederations of states more commonly slip into anarchy than fall under the rule of a tyrannical government. Madison uses the Achaean example in order to show his readers the dangers of a loose confederation of states and argue that the most secure form is a unified government under a constitution.

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[18] THE FEDERALIST No. 18 (James Madison), *supra* note 2, at 113, 116-17 (footnote omitted). At the Constitutional Convention, Madison argued that a confederation of states left the door open to foreign powers attempting to influence individual states: "As lessons which claimed particular attention, he cited the intrigues practised among the Amphyctionic Confederates first by the Kings of Persia, and afterwards fatally by Philip of Macedon: among the Achaeans, first by Macedon [and] afterwards no less fatally by Rome. . . . " MADISON'S NOTES, *supra* note 6, at 145. At the Constitutional Convention, Madison argued for representation based on population in the legislative branch and stated that the small states should not fear that the large states would act in coalition to further their selfish interests: "Among individuals of superior eminence [and] weight in Society, rivalships were much more frequent than coalitions. Among independent nations, pre-eminent over their neighbours, the same remark was verified. Carthage [and] Rome tore one another to pieces instead of uniting their forces to devour the weaker nations of the Earth." MADISON'S NOTES, *supra* note 6, at 206.

[19] *See generally* BOAK, note 13, at 99-115; JEAN HATZFELD, THE HISTORY OF ANCIENT GREECE 270-72 (Andre Aymard ed., Oliver & Boyd 1966); LEGLAY, *supra* note 13, at 81-85; MERIVALE, *supra* note 13, at 185-202; CLAUDE ORRIEUX & PAULINE SCHMITT PANTEL, A HISTORY OF ANCIENT GREECE 359-61, 365-67 (Janet Lloyd trans., 1999); STARR, *supra* note 13, at 37-38; F.W. WALBANK, ARATOS OF SICYON 26-28 (Cambridge Univ. Press 1993).

In 281, a group of four Greek city-states banded together to revive the long since dissolved Achaean League. The number of cities within this confederation of states grew over the years until its membership included Dyme, Patrae, Tritaea, Pharae, Aegion, Bura, Ceryneia, Argos, Megalopolis, Corinth, Pellene, Olenos, and Sparta. The religious center of the Achaean League rested at the temple of Zeus Amarios in Aegion. Here, the assembly of the League gathered four times each year to hold meetings (Synodoi). At the head of this assembly were the eleven members of the executive board (Synarchiae), who were the true rulers of the confederation. Because this small group of men held almost exclusive power, the Achaean League can best be described as an oligopoly.

Before the end of the Second Punic War in 201, Rome had little fear of the Greek city-states or leagues. However, Hannibal's near-conquest of Rome, after his crushing defeat of the Romans at Cannae in 216, opened the Senate's eyes to the need to defend Rome from the threat of outside invasion. As a result, Rome began to adopt a strategy of defensive imperialism, which called for Roman control over any regions that could potentially pose a threat to Rome.

After Attalus I, the king of Pergamum, and a delegation from the trading center of Rhodes warned Rome of a secret pact between Philip V of Macedon and Antiochus III of Syria and asked for Rome's assistance, Rome began to take a considerable interest in Greek affairs. The Roman Senate saw a possible threat to Roman soil if this alliance were allowed to gain power. Thus, in 200, Rome followed its newly emerging strategy of defensive imperialism and turned its attention to Philip.

Rome first gave Philip an ultimatum to either restrain himself from attacking Greek or Egyptian cities or else face war. Philip refused, and the Second Macedonian War officially commenced. At the same time, Rome sent envoys to Antiochus assuring him that it did not intend to begin any aggression against him in Syria. This statement was designed to prevent Antiochus from having any reason to join forces with Philip in Macedon.

With Antiochus out of the way, Rome was free to engage Philip and ultimately defeat him in 197 in Thessaly at the battle of Cynoscephalae. Philip then fled to Macedon and sought peace with Rome. Strangely, in the wake of the Greek campaign, Rome did not occupy or annex any Greek land.

Rome had other plans for Greece. In 196, T. Quinctius Flamininus, the Roman consul and Roman general at Cynoscephalae, proclaimed that regions once under Macedonia's domination were now independent; he thus freed the Corinthians, Phocidians, Locrians, Euboeans, Phthiot Achaeans, Magnesians, Thessalians, and Perrhaebians. Naturally, this decree caused excitement among the liberated Greeks.

The Romans had an ulterior motive in giving the Greeks their independence. The Greeks would not be free at all. Instead, Rome intended Greece to be a client state of Rome and serve three functions: (1) become a post for Roman surveillance of the east, (2) serve as a buffer state, and (3) act as a main road for any future Roman operations in the east.

During this period, anarchy began to emerge among the confederated city-states in the Achaean League. Many of the cities had been forced to join the League against their will and strived to regain independent status. Their efforts, in turn, led to internal strife within the League, and Rome was called in to pacify the situation.

The Achaean League also was facing internal division with respect to whether the League wanted Rome's intervention in its affairs. The controlling powers in the confederacy supported Roman policies, while their rivals argued that the League should be able to operate independently of any intervention by Rome. Naturally, Rome agreed with the controlling powers, and as a result, the dissenters sought an alliance with Macedon.

Macedon was by no means neutralized as a result of Philip's defeat in the Second Macedonian War. When Philip died in 179, his son Perseus inherited an army of 40,000 men. Perseus, like his father, harbored a disdain for Rome, and soon after he assumed power, began making contacts with those in Greece who shared his anti-Roman sentiments. Rome, however, was aware of this growing Macedonian threat through its espionage efforts and with the help of King Eumenes II of Pergamum. In 197, Eumenes II had succeeded Attalus I as king of Pergamum. In 171, Rome forced Macedon into the Third Macedonian War. In 168, Perseus met defeat at Pydna, and the war officially ended the following year.

Rome now set out to punish certain Greek factions, such as the Rhodians, Epireans, and Achaeans, for their perfidy in supporting Macedon. After seizing territory from Rhodes and devastating Epirus, Rome turned its attention to Achaea. Rome deported to Italy one thousand Achaean men who were reported to have been part of the anti-Roman faction. Among them was the famous historian, Polybius. The Romans learned about these men from Callicrates, a traitor to their cause. For seventeen years, these men were held as hostages, thus assuring Greek compliance with Roman policies.

The Achaean League would later fall under the rule of a factional government that was completely dependent on Rome for the maintenance of its power. However, this government would end in the aftermath of the conflict between the Achaean cities of Sparta and Corinth. In 146, an insignificant territorial dispute resulted in Corinth attacking Sparta. Following the attack, a delegation from Sparta traveled to Rome to ask for Roman intervention in this conflict within the Achaean League. As a result, a Roman delegation traveled to Achaea and demanded that the Achaean League release control of Sparta, Corinth, Argos, and some other members of the League. At this point, the League's leadership consisted of nothing more than unsupported demagogues. They refused to comply with the demand and encouraged an open revolt in order to attain independence from Roman policy. However, this ragtag group was no match for the disciplined Roman legions, and the rebellion quickly faltered. In 146, Rome exacted revenge by sacking the City of Corinth and selling its inhabitants into slavery. Rome declared that Achaea would no longer enjoy independence, but instead would become a Roman province with Roman rulers.

In *The Federalist No. 18*, Madison warns that anarchy is a common occurrence in confederations. As he makes clear with the example of the Achaean League, if the United States were to remain a loose confederation, it could meet with disaster. Instead, Madison argues that a unified government, acting under a constitution, would be the most stable governmental structure for the new nation.

C. The Risk of Foreign Influence: Roman Alliances

> They who well consider the history of similar divisions and confederacies, will find abundant reason to apprehend, that those in contemplation would in no other sense be neighbours, than as they would be borderers; that they would neither love nor trust one another, but on the contrary would be a prey to discord, jealousy, and mutual injuries; in short that they would place us exactly in the situations in which some nations doubtless wish to see us, viz. *formidable only to each other*.
>
> . . .
>
> Nay it is far more probable that in America, as in Europe, neighbouring nations, acting under the impulse of opposite interest, and unfriendly passions, would frequently be found taking different sides. Considering our distance from Europe, it would be more natural for these confederacies to apprehend danger from one another, than from distant nations, and therefore that each of them should be more desirous to guard against the others, by the aid of foreign alliances, than to guard against foreign dangers by alliances between themselves. And here let us not forget how much more easy it is to receive foreign fleets in our ports, and foreign armies in our country, than it is to persuade or compel them to depart. How many conquests did the Romans and others make in the characters of allies, and what innovations did they under the same character introduce into the Governments of those whom they pretended to protect.[20]

In *The Federalist No. 5*, Jay rejects the proposal that the states should divide into three or four regional confederacies that enter into alliances with one another. According to Jay, the natural differences in the northern and southern economies and uneven strengths of the states could lead to jealousies between the confederacies. Conflicts among these confederacies could lead an individual confederacy to increase its might by forging alliances with foreign nations. Jay then argues that a foreign ally can manipulate an alliance to conquer a confederacy. As one example, he notes that ancient Rome would act as a friend to a confederacy and slowly take it over.

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[20] THE FEDERALIST No. 5 (John Jay), *supra* note 2, at 26-27.

In *The Federalist No. 18*, Madison illustrates Jay's point with his account of the Macedonian Wars and the fall of the Achaean confederacy of Greek city-states.[21] Rome initially served as a protector and defender of the Achaean League, ostensibly to keep it stable and independent. However, Rome had its own self interest at heart and, in 146, declared the region to be a Roman province under Roman rule.

In *The Federalist No.* 5, Jay warns his readers that establishing several interrelated confederations of states would open the door to internal controversies and perhaps even foreign usurpation.[22] This foreign usurpation, Jay suggests, could happen in a way similar to the way that Rome gained dominance over allies like the Achaean League. A foreign nation could join with a confederacy under the guise of friendship, but then, slowly make changes to the confederacy and finally gain power over its former ally.

IV. THE NEED FOR A SINGLE EXECUTIVE

At the Constitutional Convention, Edmund Randolph of Virginia proposed a three member executive and declared that the single executive would be "the foetus of monarchy."[23] In elaborating on his opposition, Randolph offered four arguments:

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[21] *See* THE FEDERALIST No. 18 (James Madison), *supra* note 2, at 113-17. For a full account, see *supra* Part III.B.

[22] *See* THE FEDERALIST No. 5 (John Jay), *supra* note 2, at 25-27.

> 1. [T]hat the permanent temper of the people was adverse to the very semblance of Monarchy. 2. [T]hat a unity was unnecessary a plurality being equally competent to all the objects of the department. 3. [T]hat the necessary confidence would never be reposed in a single Magistrate. 4. [T]hat the appointments would generally be in favor of some inhabitant near the center of the Community, and consequently the remote parts would not be on an equal footing.[24]

In *The Federalist No. 70*, Hamilton points to classical Rome to argue that having multiple executives can lead to destructive rivalries among the officials and even increase the risk of tyranny.[25] To illustrate, he employs the examples of the consuls and military tribunes and the decemvirs.

A. A Multiple Executive Risks Destructive Rivalries: Consuls and Military Tribunes

> Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks: It is not less essential to the steady administration of the laws, to the protection of property against those irregular and high handed combinations, which sometimes interrupt the ordinary course of justice, to the security of liberty against the enterprises and assaults of ambition, of faction and of anarchy. Every man the

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[23] MADISON'S NOTES, *supra* note 6, at 46. Benjamin Franklin also feared that the executive would be "the foetus of a King;" however, he feared the possibility of a monarch even if the country began with a multiple executive: "I fear that tho' we do employ at first a number, and not a single person, the number will in time be set aside, it will only nourish the foetus of a King, as the honorable gentleman from Virginia [Randolph] very aptly expressed it, and a King will the sooner be set over us." *See* MADISON'S NOTES, *supra* note 6, at 53. In 1787, Pennsylvania's executive was a committee of nineteen men with no power to initiate or veto legislation. OWEN S. IRELAND, RELIGION, ETHNICITY, AND POLITICS: RATIFYING THE CONSTITUTION IN PENNSYLVANIA 11 (1995).

[24] MADISON'S NOTES, *supra* note 6, at 58 (footnotes omitted).

[25] *See* THE FEDERALIST No. 70 (Alexander Hamilton), *supra* note 2, at 471-80.

least conversant in Roman story knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator, as well against the intrigues of ambitious individuals, who aspired to the tyranny, and the seditions of whole classes of the community, whose conduct threatened the existence of all government, as against the invasions of external enemies, who menaced the conquest and destruction of Rome.

. . .

That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.

This unity may be destroyed in two ways; either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject in whole or in part to the controul and co-operation of others, in the capacity of counsellors to him. Of the first the two consuls of Rome may serve as an example; of the last we shall find examples in the constitutions of several of the states. New-York and New-Jersey, if I recollect right, are the only states, which have entrusted the executive authority wholly to single men. Both these methods of destroying the unity of the executive have their partisans; but the votaries of an executive council are the most numerous. They are both liable, if not to equal, to similar objections; and may in most lights be examined in conjunction.

The experience of other nations will afford little instruction on this head. As far however as it teaches any thing, it teaches us not to be inamoured of plurality in the executive. . . . The Roman history records many instances of mischiefs to the republic from the dissentions between the consuls, and between the military tribunes, who were at times substituted to the consuls. But it gives us no specimens of any peculiar advantages derived to the state, from the circumstance of the plurality of those magistrates. That the dissentions between them were not more frequent, or more fatal, is a matter of astonishment; until we advert to the singular position in which the republic was almost continually

> placed and to the prudent policy pointed out by the circumstances of the state, and pursued by the consuls, of making a division of the government between them. The Patricians engaged in a perpetual struggle with the Plebians for the preservation of their antient authorities and dignities; the consuls, who were generally chosen out of the former body, were commonly united by the personal interest they had in the defence of the privileges of their order. In addition to this motive of union, after the arms of the republic had considerably expanded the bounds of its empire, it became an established custom with the consuls to divide the administration between themselves by lot; one of them remaining at Rome to govern the city and its environs; the other taking command in the more distant provinces. This expedient must no doubt have had great influence in preventing those collisions and rivalships, which might otherwise have embroiled the peace of the republic.[26]

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[26] THE FEDERALIST No. 70 (Alexander Hamilton), *supra* note 2, at 471-74 (footnote omitted). At the Constitutional Convention, James Wilson of Pennsylvania argued that "the Consuls of Rome prove also the factious consequences of dividing the Executive Magistracy." MADISON'S NOTES, *supra* note 6, at 127. Madison used the example of the Roman tribunes to argue in favor of a small senate:

> The example of the Roman Tribunes was applicable. They lost their influence and power, in proportion as their number was augmented. The reason seemed to be obvious: They were appointed to take care of the popular interests [and] pretensions at Rome, because the people by reason of their numbers could not act in concert; were liable to fall into factions among themselves, and to become a prey to their aristocratic adversaries. The more the representatives of the people therefore were multiplied, the more they partook of the infirmities of their constituents, the more liable they became to be divided among themselves either from their own indiscretions or the artifices of the opposite faction, and of course the less capable of fulfilling their trust. When the weight of a set of men depends merely on their personal characters; the greater the number the greater the weight. When it depends on the degree of political authority lodged in them the smaller the number the greater the weight. These considerations might perhaps be combined in the intended Senate; but the latter was the material one.

MADISON'S NOTES, *supra* note 6, at 83-84. John Dickinson of Delaware disagreed with the proposition that the tribunes lost power as their number increased. MADISON'S NOTES, *supra* note 6, at 85.

Here, Hamilton stresses the importance of having an energetic executive and further argues that the ideal executive should consist of a single officer. Hamilton supports his position, in part, by looking to lessons from classical Rome.[27] For Hamilton, this history demonstrates that having multiple executives leads to destructive disunity. However, for the most part, the historical record demonstrates that having multiple executives was not problematic to the stability of the republic. Yet, during the nearly five centuries of the republic, conflicts between consuls caused serious problems.

In 509, with the fall of the monarchy, Rome instituted a new Republican government that included two chief magistrates, known as consuls. Originally, the consulship was filled only by men of patrician ancestry, that is, descendants of the original senatorial families of the previous regal regime. However, as Hamilton failed to note, in 367, one of the two consular positions was opened to the Roman plebeian class.

The Roman consuls were annually elected by the patrician-dominated Comitia Centuriata. After completing one year of service, an ex-consul could seek election again only after a ten year interval. In the Republic, the consuls held imperium, meaning that they would possess both military and civil power. However, any legislation proposed by the consul was subject to the approval of another assembly, the Tribunes of the Plebeians, who could veto any proposals. Further, the consul that ordered capital punishments would listen to advice given to them by the Senate. Any judicial decree of a consul that ordered capital punishment was subject to appeal to the people. Actions taken by one consul were subject to the veto by the co-consul. This dual executive thus, had an internal check, that prevented any one consul from becoming a tyrant. When a military campaign began, one or even both consuls commonly left Rome and commanded the army. Of course, this tradition carried a risk because one or both consuls could die in battle, leaving Rome without one or both executives.

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[27] For discussions of these events, see BOAK, *supra* note 13, at 65-68, 73; LE GLAY, *supra* note 13, at 37-55; LIVY, *supra* note 13, at 223-25, 275-77, 290-92; MERIVALE, *supra* note 13, at 51-52; SCULLARD, *supra* note 16, at 78-79; STARR, *supra* note 13, at 75-85.

As one might expect, the two consuls sometimes did not agree on an issue. Although the mutual agreement of the consuls served as a critical check on consular power, disagreement between the consuls occasionally did not prevent one consul from pursuing his desired course. For example, in 59, Gaius Julius Caesar and Marcus Calpurnius Bibulus were co-consuls; however, the conservative Bibulus often opposed Caesar's proposals. As a result, Gnaeus Pompeius (Pompey the Great), Marcus Licinius Crassus, and Caesar, the members of the political alliance known as the Triumvirate, employed their loyal military veterans to harass Bibulus whenever he left his house. Accordingly, Bibulus confined himself to his home, allowing Caesar to run the state without opposition from his co-consul, illegally passing any proposals he wished.

When Rome faced a particularly menacing threat, the government occasionally would resort to a single ruler, known as a dictator, who would be charged with quelling the threat. The dictatorship usually was to last no longer than six months or no longer than needed to complete the dictator's primary task. A dictator was appointed by the two consuls with the consent of the Senate. Unlike a consul, however, a dictator did not exercise control over military matters. Instead, the dictator would appoint a master of the cavalry to look after military affairs. With respect to political decision-making, a dictator enjoyed greater power than a consul; the Tribune of the Plebeians had no veto power against the acts of a dictator.

Although historical records are unclear, the first dictator is believed to have been appointed around the year 500. The Romans frequently resorted to dictators in the fifth century, but less often in the fourth century. For instance, when the Volsci, a neighboring tribe, invaded Roman territory in 407, Publius Cornelius was appointed to eliminate the threat. In the third century, the use of dictators had all but died out except for brief periods during the Punic Wars. The dictatorship fell into disuse as Roman affairs became more stable at home. However, in the first century, the dictatorship would be revived.

Following years of civil war, in 82, former consul Lucius Cornelius Sulla defeated military forces that had supported the deceased Roman general Marius. That very same year, with the ambitious opposition eliminated and with the support of his army, Sulla had himself appointed dictator. However, Sulla created a new type of dictatorship. Employing military threats, Sulla pressured the Senate into appointing him dictator for life. He ruled absolutely until he voluntarily retired in 79.

Like Sulla, Gaius Julius Caesar was able to gain the dictatorship and hold it longer than the traditional six-month period. In 49, after Caesar illegally crossed the Rubicon River and entered Italy with his army. Rome was thrown into civil war once again. This civil war matched the forces of Caesar against those of his former friend, Pompey the Great, who had recently become sole consul. In 48, Caesar defeated Pompey in battle at Pharsalus in Thessaly. Following this victory, and the subsequent assassination of Pompey in Egypt, Caesar was free to rule Italy unopposed. In 46, Caesar made himself dictator for ten years and, in 44, made himself dictator for life.

In *The Federalist No. 10*, Hamilton neglects to mention that dictators such as Caesar and Sulla were not simply checking the ambitious behavior of fellow Roman demagogues, but were pursuing their own ambitious goal of seizing power. Thus, the people of Rome did not seek refuge behind these dictators. Rather, the dictators forced themselves upon Rome.

Another powerful magistracy in Rome was the military tribune. In frenzied times, when conflict was taking place on multiple fronts, two consuls could not meet the demands of the situation. In these periods, the patrician-dominated assembly, called the Comitia Ccenturiata, would elect from the military chiefs, a board of men, who would hold the office of military tribune. By 366, however, Rome had ceased to use these military tribunes.

When military tribunes failed to back each other, the results could be disastrous. In 402 for example, Rome was at war with several tribes from neighboring territories. In a coordinated effort, the Veii, Capanetes, and the Falisci attacked a Roman fortification under the command of the military tribune

Manius Sergius. The situation was desperate for Sergius and his only hope was support from the main army group, which was camped to his rear. The main army group, however, was commanded by a fellow military tribune named Lucius Verginius. Unfortunately for Sergius' soldiers, Verginius and Sergius shared a mutual enmity for one another. As a result, Verginius would do nothing until Sergius asked him for his help. Further, Sergius, was too proud to ask his political enemy for assistance. Sergius' troops suffered massive losses and the survivors were forced to flee the fort and return to Rome in defeat.

In *The Federalist No. 70*, Hamilton argues that in order to achieve maximum efficiency in the American executive, no more than one person should serve as the chief executive officer. Hamilton pointed to the executive rivalries that occurred in Rome in instances such as the conflict between Sergius and Verginius.[28] However, Rome's difficulties require some perspective. The Republic survived for almost five-hundred years. Practically every year saw the election of a new college of chief magistrates in one form or another, either military tribune or consul. Yet, the instances of internal consular or tribunal dissent were relatively rare.

B. A Multiple Executive Increases the Risk of Tyranny: The Decemvirs

> When power therefore is placed in the hands of so small a number of men, as to admit of their interests and views being easily combined in a common enterprise, by an artful leader, it becomes more liable to abuse and more dangerous when abused, than if it be lodged in the hands of one man; who from the very circumstance of his being alone will be more narrowly watched and more readily suspected, and who cannot unite so great a mass of influence as when he is associated with others. The Decemvirs of Rome, whose name denotes

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[28] THE FEDERALIST No. 70 (Alexander Hamilton), *supra* note 2, at 473-74.

> their number, were more to be dreaded in their usurpation than any ONE of them would have been.[29]

In *The Federalist No. 70*, Hamilton argues that the risk of tyranny is greater with a multiple executive than with a single executive officer. In order to prove his point, Hamilton directs his readers to the decemvirs, a group of rulers that despotically dominated Rome in the mid-fifth century B.C.E.[30]

The Roman Republic witnessed a continuing power struggle between the patricians, the wealthy ruling class who enjoyed complete control, and the plebeians, the commoners who comprised the majority of the city of Rome. One of the major sources of tension between the two social classes in ancient Rome was the judicial system, which employed a system of common law. As common law, the laws were not codified, and the patrician magistrates exercised complete discretion in judicial matters.

In 462, Gaius Terentilius Harsa, a tribune of the plebeians, challenged this discretionary authority. Harsa insisted that the laws of Rome be codified. With codification, the magistrates would know what the law was and presumably would apply it even-handedly to both patricians and plebeians. Initially, this proposal did not garner support from the patricians. However, after a group of commoners stormed and seized the Capitol, they submitted to the plebeian demand.

The patricians first sent a group of commissioners to Greece to observe the methods used to codify laws in the east. After this research was complete, Rome interrupted its normal magistracy elections and instead appointed the College of Decemvirs, ten men to rule the state and draft the laws over a period of one year. Each of the ten men had ultimate power over the state and rotated command on a daily basis. Further, each man was assigned twelve lictors, the traditional guards and agents of the Roman consuls who carried fasces, long axes bundled with rods, which were the traditional symbol of royalty in ancient Rome.

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[29] THE FEDERALIST No. 70 (Alexander Hamilton), *supra* note 2, at 479 (footnote omitted).

[30] For discussions of these events, see BOAK, *supra* note 13, at 78-79; LE GLAY, *supra* note 13, at 43-46; LIVY, *supra* note 13, at 173-201; MERIVALE, *supra* note 13, at 78-82; WELLS, *supra* note 13, at 24-25.

In March, 451, the first College of the Decemvirs assumed power and set to work drafting the law as well as administering to the needs of the state. At the end of their year in power, the decemvirs had completed ten tables of laws, written on large flat sheets of wood. However, the task of codifying the laws was incomplete, and so a second College of Decemvirs was authorized to finish the task over the next year.

In May, 450, the second College of Decemvirs began its work under the leadership of Appius Claudius, a patrician who served with the first College of Decemvirs. During its time in power, the second decemvirate would complete a further two tables of laws, making a total of twelve tables of laws. However, during this second college, the decemvirs began to exercise a tyrannical hold of Rome. In 450, the decemvirs entered the Forum, each surrounded by his twelve lictors. Previously, only the one decemvir who was in charge of the state for the day would be surrounded by his lictors. Naturally, this display served as an overwhelming demonstration of power and served to intimidate those who would normally stand up to the decemvirs' actions.

The decemvirs then allowed the patricians to take advantage of the plebeians without any legal recourse. Young patricians would crowd around the decemvirs as escorts, stealing whatever property they wished from the plebeians and generally mistreating them. The patricians also resorted to violence against the plebeians, scourging some and beheading others.

In May 449, the decemvirs were supposed to relinquish their power. However, they called no elections, and no one was appointed in their places. As a result, the people feared that these men comprised a new and unstoppable dictatorship. Meanwhile, the Sabines and the Aequi, both tribes from the areas surrounding Rome, attacked Roman territory, and the Roman Army was ordered to engage them. However, even when a crisis faced the state from an external source, the decemvirs would not stop their tyrannical ways. While out on campaign against the Sabines, one Roman, Lucius Siccius, held secret meetings with his comrades in which they discussed the possibility of renaming the Tribunes of the Plebeians which caused the Roman plebeians to refuse military service and to secede by migrating to the Aventine Hill. News of these meetings found its way to the decemvirs, who then promptly arranged for Siccius' assassination.

However, the greatest outrage of the decemvirs, and ultimately the source of their downfall, was the attempted enslavement of a plebeian girl named Verginia. Decemvir Appius Claudius had become infatuated with Verginia despite her betrothal to a plebeian. In a scheme to have his way with the girl, Appius created the false charge that Verginia was actually a daughter of a slave and, moreover, that she was born at one of his agent's estate. If true, Verginia would have been the property of Appius' agent, who would naturally give Appius access to her. Verginia's father, Verginius, went to the Forum and appealed to Appius Claudius to drop his false accusation. When Appius refused to listen to his pleas, Verginius grabbed a butcher's knife and thrust it into Verginia.

Vergenius' defiance of the decemvirs was well received by the plebeians. Verginius then rushed to the legions, which were still on campaign, and successfully urged them to come to Rome and occupy the Aventine Hill as a demonstration of revolt. Powerless, the decemvirs were forced to relinquish their positions. Shortly thereafter, a new government was elected which was identical to the government preceding the two Colleges of Decemvirs. Justice was restored; the twelve tables of law would be equally administered to plebeian and patrician alike. Appius Claudius and another decemvir committed suicide after being taken into custody by the new Roman government. The other eight decemvirs would flee Rome forever and, in 449, the state seized their property.

In *The Federalist No. 70*, Hamilton warns of the dangers of having multiple executives ruling a country. By using the example of the decemvirs, Hamilton argues a that a body of multiple official with common interests can become oppressive. Hamilton asserts that a better system is the single executive who will be less prone to act on any tyrannical impulses than would be a group of men.

V. STRUCTURING GOVERNMENT

In constructing a new governmental system, the Framers had to face such questions as how the new national government would interact with the existing state governments and what sorts of internal checks would prevent tyranny. Although Madison believed that he was moving beyond the political science of the past, he still sought to learn from history.[31] In classical Rome, he found assistance in the stories of Rome's early leaders, in its assemblies with overlapping jurisdictions, in the senate as an internal governmental check and in the employment of tribunes as a popular check on the patrician senate.

A. Creating a Constitution by Assembly: Rome's Early Lawgivers

> It is not a little remarkable that in every case reported by antient history, in which government has been established with deliberation and consent, the task of framing it has not been committed to an assembly of men; but has been performed by some individual citizen, of pre-eminent wisdom and approved integrity. . . . The foundation of the original government of Rome was laid by Romulus; and the work completed by two of his elective successors, Numa, and Tullius Hostilius. On the abolition of Royalty, the Consular administration was substituted by Brutus, who stepped forward with a project for such reform, which he alleged had been prepared by Servius Tullius, and to which his address obtained the assent and ratification of the Senate and people. . . . History informs us likewise of the difficulties with which these celebrated reform-

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[31] *See, e.g.*, DOUGLASS ADAIR, FAME AND THE FOUNDING FATHERS 93-106 (1974) (linking Madison's political science particularly to David Hume); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 606-15 (1969) (stating that Madison and the other Framers saw themselves correcting the errors of the old political science to create a new political order).

> ers had to contend; as well as of the expedients which they were obliged to employ, in order to carry their reforms into effect. . . . If these lessons teach us, on one hand, to admire the improvement made by America on the ancient mode of preparing and establishing regular plans of government; they serve not less on the other, to admonish us of the hazards and difficulties incident to such experiments, and of the great imprudence of unnecessarily multiplying them.
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> Is it an unreasonable conjecture that the errors which may be contained in the plan of the Convention are such as have resulted rather from the defect of antecedent experience on this complicated and difficult subject, than from a want of accuracy or care in the investigation of it; and consequently such as will not be ascertained until an actual trial shall have pointed them out? This conjecture is rendered probable, not only by many considerations of a general nature, but by the particular case of the articles of confederation. It is observable that among the numerous objections and amendments suggested by the several States, when these articles were submitted for their ratification, not one is found which alludes to the great and radical error, which on actual trial has discovered itself.[32]

In *The Federalist No. 38*, James Madison notes a succession of Roman heroes who enjoy the reputation of single-handedly making drastic improvements in the City of Rome.[33] In doing so, he notes that a prevalent theme among the ancient civilizations was that of the lone ruler single-handedly building the state. These individual heroes stand in contrast to the large number of delegates from several states who together shaped America's Constitution. Madison subtly suggests that a better way to construct a government is to employ a delegation of thoughtful individuals of good will, and that it makes sense to try out this thoughtful plan of government before rejecting it or attempting to amend it.

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[32] THE FEDERALIST No. 38 (James Madison), *supra* note 2, at 239-41.

[33] For discussions of these events, see BERNSTEIN, *supra* note 1, at 231; BLOCH, *supra* note 13, at 42-62; BOAK, *supra* note 13, at 33-40; LE GLAY, *supra* note 13, at 19-27, 487-88, 508; LIVY, *supra* note 13, at 5-79; MERIVALE, *supra* note 13, at 47-69.

The first Roman lawgiver to whom Madison refers is Romulus. According to one legend, Aeneas, the Trojan hero, was blown off course by Juno and landed in Italy. Aeneas married a member of the powerful Laurentes royal clan and ruled over their territory until he drowned in the brook Numicius. His son, Ascanius, then founded the city of Alba Longa, where Aeneas' descendants remained as leaders. However, after 300 years had passed, Numitor and Amulius, both brothers and members of Aeneas' royal lineage, became rivals, and the evil Amulius ousted Numitor from the throne. Amulius then learned that his niece, Rhea Silva, had given birth to twins who were fathered by the god, Mars.

Upon realizing that the twins, Romulus and Remus, stood to inherit the throne of Alba, Amulius ordered them thrown in the Tiber River. With Romulus and Remus out of the way, Amulius was then secure in his rule. However, the two infants did not perish, but instead floated downstream and landed on the riverbank. There, they were rescued and fed by a she-wolf. Following their rescue, Romulus and Remus were discovered by Faustulus, a shepherd, who took the two boys in and raised them. When they were old enough, Romulus and Remus returned to Alba and exacted revenge on their great uncle by killing him. Leaving their grandfather to run Alba, they then set out on their own to found a new city.

When the twins arrived at the site where the shepherd had raised them, Remus saw six vultures, which he took as a sign that he would rule the new city. However, Romulus later saw vultures as well, but double in number. Romulus interpreted the greater number to mean that he was to rule the new city. Each brother was proclaimed king by his respective followers, and Romulus and Remus each selected one of the nearby seven hills on which to start his kingdom. However, according to one legend, Romulus would later kill his brother Remus after Remus tauntingly jumped over the wall of Romulus' fledgling fortifications. After the murder of Remus, Romulus remarked, "so shall perish all who attempt to pass over our walls," and, after 753 B.C., he was ruler of the city.

This city on the Tiber River would later be named Rome to honor its founder, Romulus. While king, Romulus took many steps to ensure the stability of the city. To build up the population, he declared the areas of the Palatine and Capitoline Hills to be places of refuge, which attracted diverse settlers from the surrounding regions. In order to maintain the population, he needed an influx of women to mate with his predominantly male subjects. As a solution, Romulus arranged to have a festival honoring the god Consus with a neighboring tribe called the Sabines. After the Sabines were too intoxicated to resist, the men of Rome grabbed the Sabine women and carried them back to the fortified city of Rome. This incident became known as the "Rape of the Sabines."

Naturally, conflict opened up between the Romans and the Sabines, but, when Rome was on the verge of defeat, Romulus prayed to the god Jupiter and promised to construct a temple in his honor if he would deliver the Romans from peril. Jupiter answered the prayer and the Romans were able to turn the tide of the battle. It was at this point that the Sabine women, who had been captured by the Romans, intervened on the battlefield and were able to make peace between the men. After this, Romulus and the Sabine king, Titus Tatius, would co-rule Rome in harmony. Thus, Romulus' plan to ensure the growth of the Roman population was a success. Rome now had an influx of much needed women, and Rome achieved peace with the neighboring Sabine tribe.

Romulus ruled over Rome for a total of thirty-seven years. During his long rule, Romulus is credited with creating Rome's governmental structures. To assist in ruling the state, he chose one hundred people and assigned them positions in the Senate. These early senators were known as "patres." Their descendants would also achieve positions of power in Rome as the hereditary ruling class known as the patricii (patricians). Further, he permitted the commoners to create an assembly and gave it a code of law. In 716, Romulus mysteriously disappeared, leaving the city of Rome without a ruler.

Following a year without a ruler, Numa Pompilius assumed control as Rome's second king. Of Sabine descent and of a highly religious nature, he established Rome's religious foundation. Because he saw how destructive military life was to morality, he endorsed a peaceful way of life. To this end he commissioned the construction of the Temple of Janus. The doors on this temple were to be closed whenever Rome was at peace. The doors remained closed for Pompilius' entire reign. However, as an indicator of Roman military policy and the rareness of peace, the gates of Janus were shut for only two short periods afterwards: once after Manlius' consulship at the end of the First Punic War in 241, and once again during the reign of Caesar Augustus in 29.

In his creation of Rome's religion, Pompilius set up a religious hierarchy of priests. He established priest positions (flamines) to honor Jupiter, Mars and Quirinus, and the pontifex maximus, the position of high priest. Through the efforts of Pompilius, the Alban cult of Vesta was transferred to Rome. Pompilius also developed the Roman calendar.

After Pompilius' death in 673, the Senate ratified the choice of Tullus Hostilius as the third king of Rome.[34] Hostilius, a warlike leader, stood in stark contrast to Pompilius and his peaceful ways. Hostilius would bring power to Rome by subjecting the tribes surrounding the city to war and defeat. However, Hostilius also was committed to construction projects, such as his construction of the Curia Hostilia, built as the Senate House at the base of the Capitoline Hill.

In 641, following the disappearance of Tullus Hostilius, Ancus Marcius reigned over Rome. With Marcius' death came an end the line of kings from the Sabine tribe. In their place, the Senate elected the first in a line of three kings of Etruscan origin, Tarquinius Priscus. In 578, the sons of Ancus Marcius assassinated Tarquinius Priscus. In the wake of the murder, Priscus' wife, Tanaquil installed their adopted son, Servius Tullius as the king of Rome.

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[34] Although Hamilton spells his name "Tullius Hostilius," today, scholars also spell it "Tullus Hostilius."

Servius Tullius enjoys the reputation as one of the most important statesmen in Roman history. During his rule, he took considerable measures to improve the infrastructure of Rome. Among his most important accomplishments was the division of the classes in Rome. Tullius established five classes, each divided into centuries, and created the Comitia Centuriata, which made various political decisions.

Tullius also extended the physical borders of Rome by expanding the city to the Viminal and Quirinal Hills. He then constructed a wall that surrounded all seven hills of Rome. He thus marked the boundary of Rome as it would stand throughout the Republican Era.

As with many rulers of Rome, Servius Tullius' life was cut short by murder. Tullius' daughter, Tullia, had married an equally ambitious man named Lucius Tarquinius. Upon learning that Servius Tullius intended to hand the power of Rome over to the Senate, Lucius fell upon Tullius and threw him down a flight of stairs. Afterward, Tullia, Tullius' own daughter, ran him over with a chariot. Despite the boldness of these acts, the Senate acquiesced to the argument that this was a legitimate usurpation and not murder. As a result, Lucius Tarquinius became the ruler of Rome.

The Tarquin line of kings would end after the acts by Lucius' son, Sextus Tarquinius, caused a revolution. After he raped the wife of a wealthy patrician, a group of patricians staged a revolt in order to gain liberty from the king and his family. In the wake of the revolt led by Junius Brutus in 509, the Tarquin royal family was exiled from Rome. The expulsion of the king marked the end of Roman monarchies and the beginning of the Republican Period.

The Senate created the position of consul to lead the governing of the state and Lucius Junius Brutus and Lucius Tarquinius Collatinus became the first consuls. Brutus set out a new model of government, which was said to be the model designed by former king Servius Tullius. Brutus and Collatinus returned the Senate to its original number; it had been drastically reduced by Lucius Tarquinius. The two consuls also helped the plebeians by re-establishing many of the rights that

Lucius Tarquinius had revoked. The plebeians were allowed to have their own judges and the right to appeal to their own respective tribes. In a show of dramatic devotion to the newly emerging republic, Brutus ordered the execution of two of his own sons when he learned that they were participating in a plot to restore Lucius Tarquinius to power. Brutus' consulship ended when he died in battle resisting an army raised by the Tarquin royal family.

Interestingly, it was not Brutus who was responsible for the ban on royalty in Rome. Rather it was a consul, named Publius Valerius, who pronounced that there would be no more kings ruling Rome. As an honor, the people called Valerius "Publicola," meaning "people-lover," because of his work in founding the Republican government. The authors of *The Federalist* chose his name, "Publius" as the pen name with which they would sign their contributions to the debate over ratification.

In *The Federalist No. 38*, Madison notes how the foundations of Roman government were laid by individuals acting single-handedly, specifically, Romulus, Numa Pompilius, Tullus Hostilius, Servius Tullius, and Brutus. This method is in contrast to the method that the United States adopted in drafting its Constitution. Madison argues it is safer in the planning of a new government to use a number of framers, as opposed to one man. One man, he argues, can be easily corrupted and infringe upon the liberties of the people. Thus, a group, like the gathering in Philadelphia in 1787, was the safest way to create a government and protect the liberties of the citizens.

B. Multiple Legislatures: The Comitia Centuriata and the Comitia Tributa

> I FLATTER myself it has been clearly shewn in my last number, that the particular States, under the proposed Constitution, would have CO-EQUAL authority with the Union in the article of revenue, except as to duties on imports . . . .
>
> . . . It is well known, that in the Roman Republic the Legislative authority in the last resort, resided for ages in two different political bodies; not as branches of the same Legisla-

> ture, but as distinct and independent Legislatures, in each of which an opposite interest prevailed; in one, the Patrician—in the other, the Plebeian. Many arguments have been made adduced to prove the unfitness of two such seemingly contradictory authorities, each having power to *annul* or *repeal* the acts of the other. But a man would have been regarded as frantic, who should have attempted at Rome, to disprove their existence. It will readily be understood, that I allude to the COMITIA CENTURIATA, *and* COMITIA TRIBUTA. The former, in which the people voted by Centuries, was so arranged as to give a superiority to the Patrician interest: in the latter, in which numbers prevailed—the Plebeian interest had an entire predominancy. And yet these two Legislatures co-existed for ages, and the Roman Republic attained to the utmost height of human greatness.
>
> In the case particularly under consideration, there is no such contradiction as appears in the example cited, there is no power on either side to annul the acts of the other. And in practice, there is little reason to apprehend any inconvenience; because, in a short course of time, the wants of the States will naturally reduce themselves within *a very narrow compass;* and in the interim, the United States will, in all probability, find it convenient to abstain wholly from those objects, to which the particular States would be inclined to resort.[35]

In this paper, Alexander Hamilton argues in favor of permitting both the individual states and the federal government to impose taxes. In order to counter any criticism that there would be conflicts between these dual systems, Hamilton draws an analogy to the legislative assemblies of classical Rome and their overlapping jurisdictions.[36] In the Republican Era, the Roman institutions of the Comitia Centuriata and the Comitia Tributa had similar responsibilities and powers; however, their interests were biased toward different classes of society, and they followed different operating procedures.

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[35] THE FEDERALIST No. 34 (Alexander Hamilton), *supra* note 2, at 209-10.

[36] For discussions of this topic, see generally BOAK, *supra* note 13, at 79-81; MICHAEL GRANT, THE HISTORY OF ROME 28, 69 (Charles Scribner's Sons 1978); LE GLAY, *supra* note 13, at 56-57, 60, 508; LIVY, *supra* note 13, at 70; MERIVALE, *supra* note 13, at 208; SCULLARD, *supra* note 16, at 128-30; STARR, *supra* note 13, at 54-59.

According to legend, after Servius Tullius assumed the throne in 578 B.C.E., he made many improvements to the Roman infrastructure, including establishing the Comitia Centuriata. Previously, there had been only the Comitia Curiata, which was based on a clan system, in which the Populus Romanus was divided into three tribes and then subdivided into ten groups (curiae) per tribe. Under the earlier system, members of the Comitia Curiae could vote on such matters as declaring war and appointing priests to various religious positions.

Underlying the creation of the Comitia Centuriata was a new system of political organization. The government took a census of every free person within Roman territory and recorded his or her wealth. The people were then organized into one of five classes, which were divided into a total of 193 centuries. The first class encompassed the wealthiest portions of Roman society, including eighty centuries of wealthy citizens and eighteen centuries of the knightly class, known as equestrians. The classes were arranged such that the wealthiest Romans fell into the first class and the members were progressively poorer from class one to class five. When it came time to vote on an issue, the voting started with the first class and then proceeded onto the second class and so forth until a majority was reached. However, because ninety-eight of the one hundred ninety-three centuries were in the first class, there was usually a majority as soon as the first class voted. Thus, the political power in Rome remained firmly in the hands of the patricians, who comprised the first voting class.

Although the Comitia Centuriata did lose some of its importance as time passed, the comitia nonetheless retained many of its duties throughout the Republican Era. The Comitia Centuriata remained responsible for selecting military leaders, censors, consuls, and other senior magistrates. However, because its size made it cumbersome, the Comitia Centuriata, was rarely convened to make decisions on the day-to-day operations of the Republic. Instead, the much smaller and therefore more practical Senate oversaw the general matters of the State.

In stark contrast to the patrician-dominated Comitia Centuriata was the Comitia Tributa (tribal assembly). This assembly was organized in 312 by Appius Claudius and was based on a tribal system similar to that of the Comitia Curiata. The assembly consisted of thirty-five tribes, with each a Roman citizen assigned to one of the tribes.

When voting on an issue, the Comitia Tributa favored the masses of Roman plebeians while the Comitia Centuriata favored the patrician class. The strong plebeian control of the Comitia Tributa stemmed from the equality in the voting scheme of the assembly. Instead of reserving the majority of voting units for patricians, it provided a system for representing Roman society in proportion to Rome's actual class composition. Thus, the small number of patricians was dwarfed by the significantly larger number of free Roman plebeians. A tribe's vote was simply determined by counting the number of people from that tribe in attendance on the day of the vote. Because the plebeians could muster a much larger number of votes than the patricians, they held sway. However, the patricians exercised a check on this system. As with the Comitia Centuriata, the Comitia Tributa could vote on only those legislative proposals that the Senate had promulgated

The duties of the Comitia Tributa were of less significance than those of the Comitia Centuriata. It would elect minor magistrates such as tribunes, aediles and quaestors. However, by 287, both the Comitia Centuriata and the Comitia Tributa had the power to legislate. Further, because of the relative ease of holding a vote in the Comitia Tributa, consuls would increasingly take their legislative proposals to that assembly in order to avoid convening the larger and more complex Comitia Centuriata. Therefore, it became increasingly more common for legislation, called plebiscites, to come from the Comitia Tributa.

In *The Federalist No. 34*, Hamilton argues that governmental bodies with overlapping duties can exist contemporaneously. In classical Rome, there were two such legislative assemblies with overlapping duties, the Comitia Centuriata and the

Comitia Tributa. The long life of the Republic indicates that establishing redundant legislatures will not necessarily cripple a state. Hamilton extends this argument to declare that the United States can have a dual system of taxation, with both individual states and the federal government possessing the power to levy taxes to suit their needs. However, Hamilton wrote as an advocate and did not discuss differences between the Roman and proposed American systems, in particular, the domination of the Roman Senate over both assemblies and Rome's unitary government as opposed to the dual federal-state governmental system in the United States. Such an analysis would require addressing many questions about whether these differences make the historical analogy apposite, a task perhaps not appropriate for the newspaper column that Hamilton was writing.

C. *The Senate as an Internal Governmental Check*

> It adds no small weight to all these considerations, to recollect, that history informs us of no long lived republic which had not a senate. Sparta, Rome and Carthage are in fact the only states to whom that character can be applied. . . . These examples, though as unfit for the imitation, as they are repugnant to the genius of America, are notwithstanding, when compared with the fugitive and turbulent existence of other antient republics, very instructive proofs of the necessity of some institution that will blend stability with liberty. . . . The people can never wilfully betray their own interests: But they may possibly be betrayed by the representatives of the people; and the danger will be evidently greater where the whole legislative trust is lodged in the hands of one body of men, than where the concurrence of separate and dissimilar bodies is required in every public act.[37]

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[37] THE FEDERALIST No. 63 (James Madison), *supra* note 2, at 426. At the Constitutional Convention, Madison also recognized that although the United States lacked the hereditary distinctions of classical times, there still were class differences that justified having a senate that contributed to the stability of government:

In *The Federalist No. 63*, James Madison stresses the importance of a senatorial body in the proposed national government and supports his position with examples from Carthage, Rome and Sparta. With these examples, Madison argues that an important part of a long-lived republic is a senate that serves in conjunction with the lower legislative body and the executive in a system of checks and balances.[38]

The foundations of the Roman Senate date back to the time of Romulus, the founder of ancient Rome. In 753 B.C.E., Romulus established a council of elders that became known as the Senate. This body of one hundred men served as his advisory council. Romulus elevated the members of the Senate to the status of patres (fathers of Roman society). As a result,

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> In all civilized Countries the people fall into different classes having a real or supposed difference of interests. There will be creditors [and] debtors, farmers, merchants [and] manufacturers. There will be particularly the distinction of rich [and] poor. It was true as had been observed. (by Mr. Pinkney) we had not among us those hereditary distinctions, of rank which were a great source of the contests in the ancient Governments as well as the modern States of Europe, nor those extremes of wealth or poverty which characterize the latter. We cannot however be regarded even at this time, as one homogeneous mass, in which every thing that affects a part will affect in the same manner the whole.

MADISON'S NOTES, *supra* note 6, at 194 (acknowledging the observation of Charles Pinckney of South Carolina that in the United States, distinctions based on class and wealth were not as pronounced as in other contries. *Id.* at 185.) (some words have been modernized from their original form) (parentheses in original). At the Constitutional Convention, Hamilton asserted that liberty leads to inequality:

> It was certainly true: that nothing like an equality of property existed: that an inequality would exist as long as liberty existed, and that it would unavoidably result from that very liberty itself. This inequality of property constituted the great [and] fundamental distinction in Society. When the Tribunitial power had levelled [sic] the boundary between the *patricians* [and] *plebeians*, what followed? The distinction between rich [and] poor was substituted.

MADISON'S NOTES, *supra* note 6, at 196. For a discussion of the Roman tribunes, see *infra* note 37 and accompanying text.

[38] For discussions of the Roman Senate, see BOAK, *supra* note 13, at 40-43, 67, 82; LE GLAY, *supra* note 13, at 51-52, 488, 510; MERIVALE, *supra* note 13, at 60-61; STARR, *supra* note 13, at 54-59.

their descendants would inherit the privileged noble status of patricii (patricians).

With the fall of the Roman monarchy in 509 B.C.E., the Senate took on new duties. Now composed of three hundred men, the Senate served as an advisory board and convened when summoned by one of the two consuls or a praetor, the magistrate responsible for the administration of justice and sometimes the governor of a Roman province. In addition to its advisory role, the Senate exercised control over public finances and oversaw public works projects. It also had a major voice in foreign policy and oversaw the administration of the ever-growing number of Roman provinces.

The significance of the Roman Senate to the Framers of the American Constitution related not just to its duties, but also to its function in the Roman system of checks and balances. The Roman Senate could veto any legislation put forth by the various popular assemblies. In theory, the consuls had the ability to disregard suggested courses of action given by the Senate; however, a consul rarely ignored the advice of the Senate. Further, magistrates, known as Tribunes of the Plebs, could veto proposals made by any level, including those made by a consul, the Senate or the popular assemblies .

It was this system of checks and balances that Montesquieu used as the basis for his *The Spirit of the Laws*, which, in turn, inspired the American Framers to create a system of checks and balances.[39]

As the Republic grew older the criteria for membership in the Senate evolved. In the early Republic, only the male patrician descendants of the original senators qualified for the Senate. Those chosen from these noble clans served for life, subject to dismissal only for grave public or private wrongdoings. The commoners, known as plebeians, were denied access to all positions of importance in the Republic with the exception of the position of the Tribune of the Plebs. However, in 367, after years of political unrest caused by the underrepresented plebeians, the Senate accepted a plebiscite proposed by two tribunes, Gaius Licinius and Lucius Sextius, that called for one of the two consulship positions to be held by a plebeian. With the plebeians' ability to hold the highest office in Rome also came the ability to serve in the Senate. Thus, the traditional aristocratic hold on the government was broken.

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[39] In *The Federalist*, Publius expressly refers to Montesquieu eight times. THE FEDERALIST No. 9 at 52-54, 56 (Alexander Hamilton), No. 43 at 292, 295 (James Madison), No. 47 at 324027, 328 (James Madison), No. 78 at 523 N.*, 523 n.t (Alexander Hamilton), *supra* note 2. At the Constitutional Convention, Madison explicitly referred to him twice, and Randolph explicitly referred to him once. *See* MADISON'S NOTES, *supra* note 6, at 224 (Madison), 268 (Edmund Randolph), 311 (Madison).

In *The Federalist No. 63*, Madison argues for a senate as a way to respond to threats to liberty that loom over a republic with only one legislative body. In partial support of his argument, Madison points to the ancient societies that possessed a senatorial body as proof that a senate can have a stabilizing effect on a society. Although Madison notes that the United States cannot mimic the exact functioning of these bodies, he nonetheless argues that liberty in these ancient societies was secure because of a senate's stabilizing effect on a Republic.

Perhaps ironically, Madison did not serve in the first Senate because of the opposition of Patrick Henry, who had opposed the new Constitution. Madison wrote to Thomas Jefferson:

> They made me a candidate for the Senate, for which I had not allotted my pretensions. The attempt was defeated by Mr. Henry, who is omnipotent in the present legislature, and who added to the expedients common on such occassions, a public philippic against my federal principles.[40]

D. The House of Representatives as an Internal Check: The Tribunes

> Lastly, in Sparta, we meet with the Ephori, and in Rome with the Tribunes; two bodies, small indeed in number, but

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[40] THE WRITINGS OF JAMES MADISON 313 (Gaillard Hunt ed., G.P. Putnam's Sons 1904).

> annually *elected by the whole body of the people,* and considered as the *representatives* of the people, almost in their *plenipotentiary* capacity. . . .
>
> From these facts, to which many others might be added, it is clear that the principle of representation was neither unknown to the antients, nor wholly overlooked in their political constitutions.
>
> . . . .
>
> The tribunes of Rome, who were the representatives of the people, prevailed, it is well known, in almost every contest with the senate for life, and in the end gained the most complete triumph over it. This fact is the more remarkable, as unanimity was required in every act of the tribunes, even after their number was augmented to ten. It proves the irresistable force possessed by that branch of a free government, which has the people on its side. . . .
>
> Besides the conclusive evidence resulting from this assemblage of facts, that the federal senate will never be able to transform itself, by gradual usurpations, into an independent and aristocratic body; we are warranted in believing that if such a revolution should ever happen from causes which the foresight of man cannot guard against, the house of representatives with the people on their side will at all times be able to bring back the constitution to its primitive form and principles.[41]

The only objection which remains to be canvassed is that which would substitute the proportion of two thirds of all members composing the senatorial body to that of two thirds of the members *present*. It has been shewn under the second head of our inquiries that all provisions which require more than the majority of any body to its resolutions have a direct tendency to embarrass the operations of the government and an indirect one to subject the sense of the majority to that of the minority. This consideration seems sufficient to determine our opinion, that the convention have gone as far in the endeavour to secure the advantage of numbers in the forma-

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[41] The Federalist No. 63 (James Madison), *supra* note 2, at 428, 430-31; *see also supra* Part V.C. (discussing the Roman Senate and Madison's argument on the necessity of a senate).

> tion of treaties as could have been reconciled either with the activity of the public councils or with a reasonable regard to the major sense of the community. If two thirds of the whole number of members had been required, it would in many cases from the non attendance of a part amount in practice to a necessity of unanimity. And the history of every political establishment in which this principle has prevailed is a history of impotence, perplexity and disorder. Proofs of this proposition might be adduced from the examples of the Roman tribuneship, the Polish diet and the states general of the Netherlands; did not an example at home render foreign precedents unnecessary.[42]

In discussing the tribunes of Rome, Madison is arguing for the necessity of an American senate. As Madison points out, there were countervailing elected bodies in ancient civilizations, for example, Rome's tribune of the plebeians, an elected position, beginning in the early Roman Republic and lasting well into its later years.[43] Madison views the tribuneship as a check against the potential tyranny of the Senate. Under America's proposed constitution, the Senate was expected to be elected by state legislatures and not directly by the people.[44] He argues that the popularly elected House of Representatives would furnish a check analogous to that imposed by the Roman tribunes.

In *The Federalist No. 75*, Hamilton also uses the tribunes in his argument. However, in contrast to Madison, Hamilton uses the tribunes to illustrate the ineffectiveness of a political body when unanimity is required among its member in order to pass legislation. In this paper, Hamilton was arguing for the proposition that the President should have the power to make treaties with the advice and consent of "two-thirds of the members *present*," as opposed to "two-thirds of *all* the members of the senate."[45] According to Hamilton, requiring an approving vote of two-thirds of all senators would encourage dissenting senators to absent themselves to effectively veto the treaty. Their absences, Hamilton points out, would necessitate a unanimous vote by those present, and requiring a unanimous approval for government actions would result in considerable governmental inefficiency. To support his argument against unanimous votes, Hamilton refers to the Roman Tribunes and claims that the tribunes could act only when they reached a unanimous decision.

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[42] THE FEDERALIST No. 75 (Alexander Hamilton), *supra* note 2, at 507-08.

[43] For discussions of the Roman tribunes, see BOAK, *supra* note 13, at 62-65; LE GLAY, *supra* note 13, at 51, 55-56, 508, 512; STARR, *supra* note 13, at 15.

[44] "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one vote." U.S. CONST. art. I, § 3. In 1913, the Constitution was amended to mandate popular election of senators. *See id.* amend. XVII.

Classical Rome endured much strife because of the imbalance of power between the ruling class of patricians and the underrepresented masses of plebeians. In 446 B.C.E., in response to the threat of civil unrest and possible civil war, the patricians approved the plebeians' proposal for the appointment of four magistrates, called the Tribunes of the Plebeians. The number of tribunes would later expand to ten. By gaining this magistracy, the plebeians gained a voice in the government that helped bridge the gap between the rule of the patricians and the needs of the plebeians.

The tribunes enjoyed considerable power and could veto any action taken by other magistrates, even consuls. Moreover, their bodies were considered sacrosanct. It was a crime punishable by death without trial for anyone to disregard the tribune's veto or to violate the sanctity of his body. A tribune also could offer protective amnesty (*auxilium*) to anyone who requested the tribune's assistance. This power of protection ran so far as to prevent other magistrates from interfering with those who had been granted amnesty. However, although Hamilton suggests that tribunes had to act with unanimity, the historical record does not support his contention.

The tribunes were connected to the four tribes of the assembly of tribes, the Comitia Tributa, which represented each of four geographic regions within the city of Rome. The four tribunes were elected annually, with each serving as the head of one of the four tribes. They were originally drawn from only the plebeian class; however, at the end of the Roman Republic, Emperor Augustus proclaimed that the Emperor would hold the new position of tribune for life.

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[45] THE FEDERALIST No. 75 (Alexander Hamilton), *supra* note 2, at 504.

Although Madison fails to make mention of the fact, the elected tribunes were not free of corruption. Starting in 377, two tribunes and champions of the plebeians, C. Licinius and L. Sextius, were reelected to office ten times and began to cause great political turmoil by boycotting important magistracy elections for other positions. Through the use of their veto power, they virtually stopped the patrician consuls from exercising any power.

Whenever grave danger faced the city, the Senate could appoint a dictator who would wield ultimate power. In general, Rome relied on dictators quite frequently during the fifth and fourth centuries B.C.E. and less frequently later on, except during the Punic Wars against Carthage starting in the mid third century. When a dictator held sway, a tribune lacked a veto power over his actions and thus lacked any power.

In *The Federalist No. 63*, Madison contends that the United States needs a senatorial body but argues that a senate will not become excessively powerful. Just as the Roman tribunes could check the power of aristocratic government, the proposed House of Representatives could check the Senate: "[N]othing will be able to maintain even the constitutional authority of the senate, but such a display of enlightened policy, and attachment to the public good, as will divide with that branch of the legislature, the affections and support of the entire body of the people themselves."[46]

VI. THE PROBLEM OF THE STANDING ARMY

> Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it, must be effectually confided to the foederal councils.

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[46] THE FEDERALIST No. 63 (James Madison), *supra* note 2, at 431.

> . . . .
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> The fifteenth century was the unhappy epoch of military establishments in time of peace. They were introduced by Charles VII[ ] of France. All Europe has followed, or been forced into the example. Had the example not been followed by other nations, all Europe must long ago have worne the chains of a universal monarch. Were every nation except France now to disband its peace establishment, the same event might follow. The veteran legions of Rome were an overmatch for the undisciplined valour of all other nations, and rendered her mistress of the world.
>
> Not the less true is it, that the liberties of Rome proved the final victim to her military triumphs, and that the liberties of Europe, as far as they ever existed, have with few exceptions been the price of her military establishments. A standing force therefore is a dangerous, at the same time that it may be a necessary provision. . . . America, united with a handful of troops, or without a single soldier, exhibits a more forbidding posture to foreign ambition, than America disunited, with an [sic] hundred thousand veterans ready for combat. . . .
>
> . . . .
>
> A bad cause seldom fails to betray itself. Of this truth, the management of the opposition to the Federal Government is an unvaried exemplification. But among all the blunders which have been committed, none is more striking than the attempt to enlist on that side, the prudent jealousy entertained by the people, of standing armies. The attempt has awakened fully the public attention to that important subject; and has led to investigations which must terminate in a thorough and universal conviction, not only that the Constitution has provided the most effectual guards against danger from that quarter, but that nothing short of a Constitution fully adequate to the national defence, and the preservation of the Union can save America from as many standing armies at it may be split into States or Confederacies; as from such a progressive augmentation of these establishments in each, as will render them as burdensome to the properties and ominous to the liberties of the people; as any establishment that can become necessary, under a united and efficient Govern-

> ment, must be tolerable to the former, and safe to the latter.[47]

In this paper, Madison argues that creating a standing army in America is a necessary evil. As he notes, Rome was able to conquer her neighbors who did not maintain adequate military defenses. However, Madison also notes that the same standing army that brought Rome victories abroad also interfered with domestic politics and sometimes controlled them.[48]

Madison argues that in the United States, standing armies are necessary to deter foreign attack however, if each state abandoned the system of the citizen-militia and raised its own standing army, this multitude of military forces could easily infringe upon the liberties of the citizens. To prevent this threat to liberty, Madison argues that a single standing army serving a united America would provide adequate defense to the Nation as well as minimize the domestic threats to liberty that commonly accompany standing armies.

During the Republican Era, Roman armies conquered the majority of the rim of the Mediterranean, including Carthage, Greece, Gaul, Numidia, Africa, Macedonia, Spain, Asia, Cyrenaica, and Egypt. The legions usually were levied for the campaign season, spanning March to October, and then were disbanded for harvest season. By 60, Rome had about fourteen standing garrisons of troops, with service requirements of six to sixteen years.

Between 29 B.C.E. and 14 C.E. with the rise of Caesar Augustus, the Roman army faced fundamental changes that would remain throughout the age of the Roman Empire. There were to be twenty-eight legions, comprised of approximately six thousand men each (including noncombatants) and one hundred twenty cavalry soldiers. These legionaries were to serve for at least twenty years. By creating such a long and continuous service requirement, Augustus was able to create a standing army of professional soldiers. These legions were permanently stationed in locations across the Roman Empire and one legion, known as the praetorian cohort, was charged with the duty of protecting the Emperor, and its members were stationed in Rome and the surrounding cities.

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[47] THE FEDERALIST No. 41 (James Madison), *supra* note 2, at 269, 274. At the Constitutional Convention, Hamilton argued for an executive elected for life so that the executive would enjoy full independence from other political forces and institutions in government. Giving an unfortunate historical example of politically compromised leadership, he noted that "[t]he election of Roman Emperors was made by the *Army*." MADISON'S NOTES, *supra* note 6, at 137.

[48] For a discussion of these events, see BOAK, supra note 13, at 295, 316-17, 328-29; LE GLAY, *supra* note 13, at 62, 87, 191-92, 274; MERIVALE, *supra* note 13, at 436-37, 465-66, 468, 488-99; STARR, *supra* note 13, at 94-95, 110-11.

Although much Roman military activity during the Empire involved quelling rebellions in Roman provinces, the standing army also played a role in expanding the Empire. Examples include Emperor Claudius' invasion of Britain and the Dacian wars.

The invasion of Britain illustrates how Rome could dominate a country with inferior defenses. In 43 B.C.E., the Emperor Claudius ordered the invasion in response to the threat created by Belgian tribes of Britain who were raiding the coast of Gaul. Britain's wealth of natural resources may also have played a role. Claudius' lieutenant Aulus Paulus led an army of four legions across the English Channel and landed on the coast of Kent. Paulus then quickly forced his way up the Thames, easily defeating the unorganized fighting forces of the local tribes along the way. He also easily subdued the Trinobantes, the local tribe inhabiting the Essex area, and conquered Britain in only sixteen days. The Roman legions continued their sweep across the island and defeated the tribal prince Caractacus on the battlefield in present-day Wales. With the pacification of Britain drawing to a close, the Romans erected the temple of Rome and Augustus at Camulodunum and proclaimed Britain an official province of the Roman Empire.

Another example of the Roman Empire using its superior military force was the Dacian Wars on the Danube in present-day Hungary. In 101 C.E., Emperor Trajan ordered an invasion of Dacia in response to the threat of a possible anti-Roman alliance led by King Decebalus. Trajan and his legions repeatedly defeated their barbarian adversaries on the battlefield and chased any retreating men into Dacian territory. In 102, Trajan conquered the heart of Dacia and took the Dacian capital of Sarmizegethusa, compelling Decebalus to sue for peace. This speedy conquest demonstrates the efficiency of the Roman legion in covering large distances and quickly pacifying unorganized tribes.

In 105, Decebalus and his followers resumed their hostilities against Rome by attacking the Iazyges, who were allied to Rome, and destroying the Roman outposts in Dacia. Once again, Trajan quickly re-conquered the region and re-took the Dacian capital. After fleeing to his mountain fortress, Decebalus took his own life. With this event, the pacification of Dacia was complete. Rome then made the region, north of the Danube, into a Roman province and moved in settlers from different parts of the Empire.

Madison neglects to point out that Rome's imperial legions did not completely dominate the neighbors of Rome. In fact, legions sometimes faced annihilation by soldiers that were less organized and had inferior training. An example is, the "Varus Disaster" of 9 C.E.

During the reign of Augustus, the Rhine region was not yet a securely held Roman province, but hosted only a precariously placed Roman government ruling over the Germanic inhabitants. The Roman proconsul was Quintilius Varus, whose system of governing by Roman law did not receive a warm welcome from the Germans. The Germans followed a demagogue named Arminius and rose against the Roman establishment, forcing Varus to mobilize three legions in an effort to engage the rebels on the battlefield. As Varus led his legions through the passes of the Teutoburger Forest, the Germans ambushed the legions. In the fighting that followed, three legions were annihilated, three eagles standards representing the pride of the three Roman legions were carried off, Varius committed suicide, and Germany was lost. Thus, in one day, Rome lost three of its twenty-eight legions to a force that was supposed to be inferior in every way.

Whatever advantage Rome gained by having standing armies came at the cost of increased military domination over the domestic affairs of the state. From roughly 27 B.C.E. to 200

C.E., the praetorian cohort in Rome played a major role in Roman politics. The demonstrations of praetorian influence started modestly, when after the death of Emperor Tiberius, Naevius Cordus Sutorius Macro, a praetorian prefect, recommended to the Senate that it accept the young Caius (Caligula) as the next Emperor. However, soon afterward the praetorian prefects, backed by their soldiers stationed on the outskirts of Rome, became increasingly bolder in their political interference. In 41 A.D., Caligula's reign was cut short by Cassius Chaerea, a praetorian, and a group of conspirators, all of whom Caligula had insulted.

Immediately following the assassination of Caligula, the praetorian cohort would once again exercise its political influence by selecting the next emperor. On the same day as the assassination, some praetorian soldiers were wandering through the Imperial palace when they discovered Caligula's uncle Claudius cowering behind some curtains. The guardsmen hoisted Claudius up and carried him off to their encampment, where they decided that Claudius could serve as a tool of the Praetorian Guard. To insure Claudius's elevation, the soldiers brought him before the Senate and insisted that it accept him as Emperor. Once again, the Senate acquiesced to the praetorian's demands.

The praetorians were not the only standing legion to interfere in Roman political matters. On occasion, the frontier legions would also rise up in an effort to install their choice of emperors. After the death of Emperor Nero in 68, the legions in Spain proclaimed their leader, Galba, the new emperor and began the march to Rome. On his march into Rome, Galba used his military support to make examples out of those who also desired power over the Empire. As he arrived in Rome, a mutiny sprung up among soldiers in upper Germania, who were unhappy with Galba's succession to the throne. At the same time, Otho, another aspirant the throne, began to turn Galba's own soldiers against him. These soldiers had grown discontented with the idea of marching to Germania in order to quell the opposition to Galba. Shortly thereafter, Galba was killed by a group of soldiers who had sided with Otho, and Otho became Emperor.

However, the legions in Gaul supported Vitellius, their general, as an aspirant to the throne. Toward this end, Vitellius began to march his legions toward Rome, and Otho mobilized his troops to intercept those of Vitellius. This civil war progressed until Vitellius met with victory at the Battle of Bedriacum. Following the battle, Vitellius and his troops marched across the countryside, looting the villas and villages that they met along the way.

While this civil war was raging, the legions of the east, who held nearly one-half of all Roman military strength, had remained voiceless in the struggle. Then in July, 69, Mucianus, the proconsul of Syria, began a march west, supported by his first in command, Flavius Vespasianus, whom the soldiers had chosen to be the next Emperor. In December, 69, Vespasian's armies arrived at Rome and broke through the walls. They followed Vitellius' retreating troops into the recesses of Rome, all the while looting the city as they passed through. Finally, they captured Vitellius at the imperial palace and put him to death. Supported by his legions, Vespasian was named the new Emperor by the Senate, and the civil war officially came to a close.

The assassination of Emperor Pertinax offers a final example of the dangers that standing armies pose. In March, 193, the Praetorian Guard realized that Pertinax would not be its puppet and arranged for his assassination. Following the assassination, the praetorian prefects recognized that there were multiple parties who wished to assume the throne and decided to auction off the position to the highest bidder. A senator, Marcus Didius Julianus, purchased the throne by paying 25,000 sesterces to each praetorian prefect. Because the senate feared reprisals from the Praetorian Guard, it was powerless to object to the transaction.

Yet, once again the frontier legions rose up against the new Emperor, and under the command of Publius Septimius Severus, they marched on Rome. In this instance, however, the march on Rome was much less destructive than that resulting from the civil war of 69. After a soldier murdered Julianus, Severus simply assumed power.

In *The Federalist No. 41*, Madison argues that although standing armies are necessary, they can destroy the liberties of the very nation that they are designed to protect.[49] As illustrated by the campaigns waged by Claudius and Trajan, standing armies enabled Rome to dominate its militarily inferior neighbors. However, this success came at a cost, as the very same legions that brought victory to Rome also served to create political upheaval at home. Moreover, maintaining the military consumed considerable revenue.

In order to enjoy security and yet minimize the problems inherent in having standing armies, Madison argues in favor of a national standing army. He also recognizes that a national standing army acts as a check on the armies of the individual states.

VII. CONCLUSION

This survey of Roman history and its meaning for the authors of *The Federalist* must leave the modern reader with a number of questions. This Article concludes by discussing three of them: First, did the first readers of *The Federalist* understand these classical references? Second, why does Publius choose to make references to a Roman Era that was hardly the model of good government? Third, with the change in our intellectual canon, what political analogies does a modern commentator use in place of the classical ones?

The modern reader must be impressed with the familiarity of late eighteenth century readers with classical civilization. Hamilton, Madison, and Jay were well-educated and well-read.[50] At the Constitutional Convention, all references to

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[49] THE FEDERALIST No. 41 (James Madison), *supra* note 2, at 269-71.

[50] On the formal education of Hamilton (King's College, now Columbia University) and Madison (Princeton), see RICHARD B. MORRIS, WITNESSES AT THE CREATION: HAMILTON, MADISON, JAY AND THE CONSTITUTION 30-32, 99-101 (1985). In 1786, Madison undertook an extensive study of past and present confederacies, including those from the classical era. For his extensive notes, see *Notes on Ancient and Modern Confederacies*, *in* 9 THE PAPERS OF JAMES MADISON 3-24 (Rob-

Rome were made in speeches by six well-educated deputies: Madison, Hamilton, John Dickinson of Delaware, James Wilson of Pennsylvania, Charles Pinckney of South Carolina, and Gouverneur Morris of Pennsylvania.[51] However, not all deputies to the Constitutional Convention or readers of *The Federalist* enjoyed the same academic background, although about half the deputies to the Convention had attended or graduated from college in the United States or abroad.[52] Hamilton, Madison, and Jay were experienced in the fields of politics and law and therefore knew that they had to communicate with a particular audience, whatever its level of sophistication.

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ert A. Rutland & William M.E. Rachal eds., Univ. Chi. Press 1975). On Jay's formal education, see FRANK MONAGHAN, JOHN JAY 26-32 (1935). When Jay attended King's College, the college statutes required:

> Each person, to be admitted, shall be able to give a rational account of the Latin and Greek grammers [sic], to render Sallust, Caesar's Commentaries, or some part of Cicero's Works, into English, the Gospels, at Least, from the Greek into Latin, and to translate correctly both English into Latin, and Latin into English.

Statutes of King's College in the City of New York, *in* 1 JOHN JAY, THE MAKING OF A REVOLUTIONARY—UNPUBLISHED PAPERS 1745-1780, at 55-56 (1975).

On the familiarity of the deputies to the Constitutional Convention with classical history and their facility with Latin and Greek, see *supra* note 6; RICHARD M. GUMMERE, THE AMERICAN COLONIAL MIND AND THE CLASSICAL TRADITION 174 (1969). On the pervasive role of the classics in the eighteenth century American educational system, see CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT 12-38 (1994).

[51] On the educational backgrounds of Hamilton and Madison, see *supra* note 42 and accompanying text. Dickinson studied law in Philadelphia and at London's Middle Temple. *See* FRAMERS OF THE CONSTITUTION 139 (James H. Charleston et al. eds., Nat'l Archives Records Admin. 1986). Wilson, Scottish born, studied at St. Andrews University, the University of Glasgow, and the University of Edinburgh. *Id.* at 210. Charles Pinckney studied in South Carolina, but did not attend a college. *Id.* at 190. Gouverneur Morris attended King's College. *Id.* at 183.

At the Constitutional Convention, Madison referenced classical Rome six times. *See* MADISON'S NOTES, *supra* note 6, at 76-77, 83-84, 145, 194, 206, 214. Hamilton referenced it three times. *Id.* at 132, 137, 196. Dickinson referenced it twice. *Id.* at 85-86, 506. Gouverneur Morris referenced it once. *Id.* at 463-64. Charles Pinckney referenced it four times. *Id.* at 182, 185, 505, 571. James Wilson referenced it twice. *Id.* at 127, 151-52.

For thumbnail biographies of all the deputies, see generally DANIEL FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 437-44 (1990).

[52] *See* FRAMERS OF THE CONSTITUTION, *supra* note 51, at 120.

Yet, these authors could correctly assume that their historical references would not be lost on their readers. As one authority has stated, the late eighteenth century was "truly a classical age."[53] As Forrest McDonald has pointed out, citizens could learn about classical civilization from a multiplicity of secondary sources, including "plays, newspapers, orations, and charges to grand juries."[54] How much depth there was to the historical knowledge of the citizenry is an open question.[55]

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[53] WOOD, *supra* note 31, at 49.

[54] MCDONALD, *supra* note 6, at 68-69.

> During the late colonial and early national periods theatrical productions of Addison's *Cato*, Shakespeare's *Julius Caesar*, Nathaniel Lee's *Alexander the Great*, Thomas Otway's *Venice Preserved*, and Henry Brooke's *Gustavus Vasa, the Deliverer of His Country*, among many others, familiarized American audiences with classical lore and republican ideals. . . . Meanwhile, since the 1720s American printers had been reprinting . . . essays, articles, plays, and poems from the *Tattler*, the *Guardian*, the *Craftsman*, the *Spectator*, and other British publications. In this way, thousands of Americans who perhaps never read any book except the Bible could share the classical revival that had begun to flourish in Britain during the seventeenth century and continued to do so during the eighteenth, and could thereby absorb republican sentiments and values without being aware of where they came from. The message was cast wider in public orations, which were among the limited number of forms of popular entertainment. . . . Grand-jury charges, such as those delivered by John Jay, were likewise popular forums for the spreading of republican values.

Id. at 69.

[55] *See* MEYER REINHOLD, *Survey on the Scholarship on Classical Traditions in Early America, in* CLASSICAL TRADITIONS IN EARLY AMERICA 1, 9-14 (John W. Eadie ed., Ctr. for Coordination of Ancient and Modern Studies, Univ. Mich. 1976) (questioning the depth of classical influences on early Americans and "the extent to which this knowledge of the Classics was determinative of thought and action."). Many scholars seem to agree that the classics were used to illustrate, but not to determine political and social beliefs. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 26 (1967) (suggesting that enlightenment rationalism was more directly influential); GUMMERE, *supra* note 50, at viii ("[T]hey took from the past whatever was relevant to their own concerns and transmuted the material into their own language.").

For an analysis of these arguments, concluding that the classics exerted a formative influence on the Founders, see RICHARD, *supra* note 50, at 1-10:

> The classics supplied mixed government theory, a principal basis for the U.S. Constitution. The classics contributed a great deal to the founders' conception of human nature, their understanding of the nature and pur-

However, great depth is not necessary to understand Publius' references.

To use a modern example, today's somewhat educated citizens would know that the United States Constitution was drafted at the Constitutional Convention and that the dispute between the large and small states led to the Great Compromise.[56] They would know that under the Great Compromise, the House of Representatives would consist of delegates elected by popular vote and that the Senate would consist of two delegates from each state.[57] For these modern citizens, this knowledge of the Great Compromise is sufficient to understand the structure of the national government and the value of compromise; however, most citizens likely do not know that the vote accepting the compromise passed by the slim majority of 5-4-1.[58] The vote became permanent only when the large states

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> pose of virtue, and their appreciation of society's essential role in its production. . . . The struggles of the Revolutionary and Constitutional periods gave the Founders a sense of kinship with the ancients, a thrill of excitement at the opportunity to match their classical heroes' struggles against tyranny and their sage construction of durable republics.

Id. at 8.

[56] *See, e.g.*, BERNSTEIN, *supra* note 1, at 167-70 (recounting these events).

[57] *See* U.S. CONST. art. I, §§ 2, 3.

[58] *See* MADISON NOTES, *supra* note 6, at 297. The majority consisted of four small states that opposed proportional representation (Connecticut, New Jersey, Delaware, and Maryland) and North Carolina that previously had voted with the large states on this issue. The minority consisted of two large states, Pennsylvania and Virginia, and two states that had allied themselves with the large states, South Carolina and Georgia. Massachusetts, a large state that had previously voted for proportional representation in both houses, divided with two deputies on opposite sides of the proposition. *See id.*

Compare the historical record with this account from a leading college text on American history, which pictures the decision as a compromise and not as the result of a very close vote:

> After bitter and prolonged debate, the "Great Compromise" of the convention was hammered out and agreed upon. . . . The larger states were conceded representation by population in the House of Representatives . . . and their smaller sisters were appeased by equal representation in the Senate . . . . Each state, no matter how poor or small, would have two senators. The big states . . . obviously yielded more. As a sop to them, the delegates agreed that every tax bill or revenue measure must originate in the House, where population counted more heavi-

decided not to support the call for a reconsideration of the vote and thus accept the vote for the "compromise."[59] This decision by the large states was the true compromise. To understand the significance of the Great Compromise and to employ it as a way to understand the distribution of power among states of all sizes, a citizen need not be familiar with the details. A certain quantum of knowledge is enough. In the same way, American citizens of the late eighteenth century could appreciate Rome's lessons without the need to become academics.

A second question of the modern reader might be why does Publius focus almost exclusively on classical Rome's Republican Era? In view of today's popular entertainment and the interest of a heavily Christian society on the time of Jesus, today's citizenry focuses more on the Roman Empire than on the previous centuries. One indicator of this focus is the era portrayed in movies. The only Roman-oriented movies to win Academy awards are *Ben-Hur*[60] and *Gladiator*,[61] both set in the earlier Roman Empire. Other top American box office movies also place themselves in the era beginning with Julius Caesar, for example, *Cleopatra* (1963),[62] *The Passion of the Christ*,[63] and *The Robe*.[64]

> ly . . . . This critical compromise broke the logjam, and from then on success seemed within reach.

DAVID M. KENNEDY ET AL., THE AMERICAN PAGEANT: A HISTORY OF THE REPUBLIC 180 (12th ed. 2002) (citations omitted).

[59] On the morning after the vote on the Great Compromise, members of the large states caucused to decide on a next step; but meeting proved inconclusive. When the Convention convened, Gouverneur Morris of Pennsylvania moved for a reconsideration of the vote; however, the motion failed for lack of a second. *See* KENNEDY, *supra* note 58, at 301-02.

[60] BEN-HUR (Metro-Goldwyn-Mayer 1959); *see Academy of Motion Picture Arts and Sciences, Best Picture, available at* http://www.filmsite.org/bestpics.html (last visited Nov. 9, 2005) (listing winners of Oscars for Best Picture).

[61] GLADIATOR (Universal Pictures 2000). *See Academy of Motion Picture Arts and Sciences, Best Picture*, *supra* note 59.

[62] CLEOPATRA (Twentieth Century Fox 1963).

[63] THE PASSION OF THE CHRIST (ICON 2004).

[64] THE ROBE (Twentieth Century Fox 1953). *Ben-Hur, Cleopatra, The Passion of Christ*, and *The Robe* are among the most successful box office movies, ranking eleventh, thirty-eighth, forty-fourth, and fifty-third, respectively (adjusting the dollar amounts for inflation); *see All-Time USA Box Office Leaders*, *available at*

The reason for *The Federalist's* focus on the Roman Republic has to lie with the word "republic." From Publius' viewpoint, he is advocating a republican government and, therefore, would naturally look to an earlier republic for lessons in political science. Of course, the word "republic" has been used to describe many types of governments. In *The Federalist No. 10*, Madison defines a republic as "a Government in which the scheme of representation takes place. . . ."[65] In distinguishing a republic from a democracy, he writes:

> The two great points of difference between a Democracy and a Republic are, first, the delegation of the Government, in the latter, to a small number of citizens elected by the rest: secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.[66]

From this definition, it would appear that a republic is a representative government with a fairly significant population and geographical size. Although the Roman Republic had a significant population and size, its character as a representative government might be open to question. Although there were popular assemblies and tribunes representing the people, there was also a dominating patrician senate and continuing conflict between the rich and poor that might fit the definition of a class struggle.[67]

At the same time, it would have been difficult for Publius not to use examples from a well known civilization that had at least some elements of representation, some roughly comparable governmental structures, and the distinction of lasting over 500 centuries.[68] Publius employs republican Rome to offer

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http://www.filmsite.org/boxoffice.html (last visited Nov. 9, 2005).

[65] THE FEDERALIST No. 10 (James Madison), *supra* note 2, at 62.

[66] THE FEDERALIST No. 10 (James Madison), *supra* note 2, at 62. On the nature of republican government and society in the eyes of the Framers, see DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 118-23 (Univ. Chi. Press 1984); MCDONALD, *supra* note 6, at 66-77.

[67] "This inequality of property constituted the great [and] fundamental distinction in Society. When the Tribunitial power had levelled [sic] the boundary between the *patricians* [and] *plebeians*, what followed? The distinction between rich [and] poor was substituted." MADISON'S NOTES, *supra* note 6, at 196.

[68] "The history of antiquity thus became a kind of laboratory in which autop-

some positive lessons, but mostly negative ones.[69] Rome offered lessons on the dangers of confederacies and the inadvisability of a single executive. It also offered positive precedents for overlapping state and federal jurisdictions and for a senate, as well as mixed lessons on using the House of Representatives as an internal check on the legislative branch and on establishing a standing army. Still, ultimately, the Roman Republic had failed. The Framers' goal was to avoid a similar failure.

Although Publius looks to the Roman Republic for lessons in political science, he knew that he was advocating a wholly new system of government. As Madison proclaimed at the Constitutional Convention, the Framers were "framing a system which we wish to last for ages."[70] Hamilton agreed that "we were now to decide for ever [sic] the fate of 'Republican Government.'"[71] According to Publius, the central question of the ratification debate was "whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force."[72] A wrong decision on ratification "may . . . deserve to be considered as the general misfortune of mankind."[73] Still, history had to inform the decision. As Publius notes, "experience [is] the least

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sies of the dead republics would lead to a science of social sickness and health matching the science of the natural world." WOOD, *supra* note 31, at 52; *see* GEORGE KENNEDY, *Classical Influences on the Federalist, in* CLASSICAL TRADITIONS IN EARLY AMERICA, *supra* note 54, at 118, 138 (suggesting that the classical references helped make *The Federalist* "acceptable to educated men of the age as the effort of reasonable, literate, and humane men of manners and learning.")

[69] Although the classical period gave the founders both models and "antimodels," as one historian phrases it, Publius' focus is on the antimodel. *See* RICHARD, *supra* note 49, at 53-122. Antimodels are "those ancient individuals, societies, and government forms whose vices [the Founders] wished to avoid. . . ." *Id.* at 85.

[70] MADISON'S NOTES, *supra* note 6, at 194.

[71] MADISON'S NOTES, *supra* note 6, at 195-96.

[72] THE FEDERALIST No. 1 (Alexander Hamilton), *supra* note 2, at 3.

[73] THE FEDERALIST No. 1 (Alexander Hamilton), *supra* note 2, at 3.

fallible guide of human opinions."[74] The founders thus married enlightenment thinking and historical analysis.

As a final question, the modern reader might look to the present age in which classical analogies have become remote and ask what a contemporary commentator might use in their place. If not a classical analogy, then what?

In truth, our political discourse has become insular. Our analogies are to our own history. We may make reference to our founding, to the Civil War, to Reconstruction, to the Industrial Revolution, to the challenge of immigration, to the New Deal, and to our wars with other nations. However, references to the experiences of other countries have become quite rare. Perhaps our history, now over 200 years more extensive than it was at the founding, offers closer analogies than other countries can offer. Perhaps comparative law—including comparative analyses to the laws of past civilizations—has failed to realize its promise.

Yet, political history is about people, their character, their use of power, and their relationships as much as it is about political institutions and events. The lessons from this sort of history are profitable and transcend the limits of time and culture. Perhaps we still can profit from learning about the decemvirs, the tribunes, and Rome's army. The study of history remains a worthy endeavor.

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[74] THE FEDERALIST No. 6 (Alexander Hamilton), *supra* note 2, at 32; *see also* MADISON'S NOTES, *supra* note 6, at 447 ("Experience must be our only guide. Reason may mislead us.") (quoting John Dickinson).

THE MODALITIES OF THE NINTH AMENDMENT: WAYS OF THINKING ABOUT UNENUMERATED RIGHTS INSPIRED BY PHILIP BOBBITT'S *CONSTITUTIONAL FATE*

Jeffrey D. Jackson[*]

Abstract:

Although the Ninth Amendment to the United States Constitution suggests the existence of certain "unenumerated" constitutional rights beyond those mentioned in the text of the Constitution and Bill of Rights, it has been all but ignored by the United States Supreme Court. Instead, courts have tended to treat the Ninth Amendment as simply a "truism" that is no longer relevant to the interpretation of the Constitution. As a result, there is a real danger that many important rights which were part of the original vision of the Constitution will be lost.

Some of the reluctance to acknowledge the Ninth Amendment may stem from the expansiveness of its text. Although it seems to refer to rights outside those already provided for in the Constitution, it gives no guidance as to how these rights are to be discerned or applied. Absent this guidance, the use and application of the Ninth Amendment is a daunting task.

This article examines the ways in which we might think about identifying, interpreting, and applying unenumerated rights under various types of constitutional arguments, using

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as tools the six "constitutional modalities" identified by Philip Bobbitt in his book, *Constitutional Fate*. By examining possibilities and limitations that each modality provides and places on the existence, identification, interpretation, and application of unenumerated rights, the article argues that, no matter what modality or mix of modalities the user favors, there are ways in which the Ninth Amendment can be effectuated.

I. INTRODUCTION

> "What are you planning to rely on to support that argument, Lester, the Ninth Amendment?"[1]

The Ninth Amendment to the United States Constitution provides that: "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[2] Although as surely a part of the Constitution as the other amendments, the Ninth Amendment has remained an enigma. From its inception, the Ninth Amendment has been virtually ignored by the United States Supreme Court, and no decisions of the Court have directly relied upon it.[3] However, the possibility that the Ninth

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[1] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 34 (1980). According to Ely, the Ninth Amendment is more likely to be the punch line of a joke than an actual argument articulated by litigants or courts. Ely's comment about "Lester" appears to be one of the few universal references in pieces concerning the Ninth Amendment. *See, e.g.*, Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 90 (2000); Thomas B. McAffee, *A Critical Guide to the Ninth Amendment*, 69 TEMP. L. REV. 61, 64 n.13 (1996); James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 235 n.110 (1993); Tejshree Thapa, *Expounding the Constitution: Legal Fictions and the Ninth Amendment*, 78 CORNELL L. REV. 139, 151 n.74 (1992). *See also* Louis H. Pollack, *Advocating Civil Liberties: A Young Lawyer before the Old Court*, 17 HARV. C.R.-C.L. L. REV. 1, 23 (referring to the Ninth Amendment as "Lester's Amendment").

[2] U.S. CONST. amend. IX.

[3] *See* Niles, *supra* note 1, at 89 (noting the few cases in which the Ninth Amendment has been mentioned by the United States Supreme Court). This does not mean, however, that unenumerated rights have not played a substantial role in Supreme Court jurisprudence. Rather, the Supreme Court has recognized a

Amendment could open the door to the recognition of fundamental constitutional rights beyond those enumerated in the Constitution has generated a considerable volume of debate on the amendment's meaning and possible application.[4] The debate is more than academic, in that views on the Ninth Amendment have played an important part in shaping the current makeup of the Court.[5]

The existence of the Ninth Amendment raises several substantive questions for those who would seek to use it as a source for unenumerated constitutional rights; "the hoped-for lost ark of the constitutional covenant."[6] The initial question is whether the Ninth Amendment can be properly read to support the existence of such rights, and it is with this question that the majority of scholarship on the Ninth Amendment is devoted. The competing traditions in Ninth Amendment scholarship are the so-called "traditional view" of the Ninth Amendment, which argues that the Ninth Amendment was meant simply as a truism; a corollary to the Tenth Amendment establishing only that the government was one of limited powers,[7] and the more expansive view which holds that the

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large number of unenumerated rights through the rubric of "substantive due process." *See infra* notes 104-06 and accompanying text.

[4] Niles, *supra* note 1, at 88 (referring to amount of scholarly debate as "a relative gusher of comment").

[5] *See* Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 133-35 (1988) (arguing that the nomination of Robert Bork floundered in large part because of his discussion of the Ninth Amendment and his refusal of an unenumerated right to privacy, and also arguing that Justice Anthony Kennedy's more favorable view on the Ninth Amendment helped to create the perception that he was more moderate than Bork); Cameron S. Matheson, *The Once and Future Ninth Amendment*, 38 B.C. L. REV. 179, 180 (1996) (detailing the questioning of Justice Stephen Breyer during his Senate confirmation hearings regarding his work on *Griswold v. Connecticut* as Justice Goldberg's law clerk, as well as his views on the Ninth Amendment); *see also* McAfee, *supra* note 1, at 63 (noting Levinson's argument); Niles, *supra* note 1, at 88 n.5 (noting Levinson's argument).

[6] STEPHEN K. SHAW, THE NINTH AMENDMENT: PRESERVATION OF THE CONSTITUTIONAL MIND, Preface (1990).

[7] *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 185 (1990); JAMES H. HUSTON, *The Bill of Rights and the American Revolutionary Experience, in* A CULTURE OF RIGHTS: THE BILL OF

Ninth Amendment was meant to establish the existence of other fundamental and enforceable rights not included in the first eight amendments.[8] If it is assumed that the latter view is correct and the Ninth Amendment does provide a source for unenumerated rights, then this brings up another, and in my view more interesting, question: what is the nature of the

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RIGHTS IN PHILOSOPHY, POLITICS, AND LAW – 1791 AND 1991 91 (1991); Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980); Russell L. Caplan, *The History and Meaning of the Ninth Amendment,* 69 VA. L. REV. 223, 227-28 (1983); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication*; *Three Objections and Responses*, 82 NW. U. L. REV. 226, 269-73 (1988); Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 94-95 (1988); Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C. L. REV. 421 (1991); Arthur Wilmarth, *The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 AM. CRIM. L. REV. 1261, 1287-89 (1989).

[8] *See* ELY, *supra* note 1, at 34-41; MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS 63-69 (1994); Sotirios Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?*, 64 CHI.-KENT. L. REV. 67 (1988), *reprinted in* 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 60-65 (Randy E. Barnett ed., 1989); Randy E. Barnett, *Introduction, James Madison's Ninth Amendment, in* 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 33 (Randy E. Barnett ed., 1989); Charles, L. Black, Jr., *One Nation Indivisible: Unnamed Human Rights in the States*, 65 ST. JOHN'S L. REV. 17, 25-26 (1991); Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTING L.J. 305, 313-314 (1987); David N. Mayer, *The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAfee*, 16 S. ILL. U. L.J. 313, 316-17 (1992); Simeon R. McIntosh, *On Reading the Ninth Amendment: A Reply to Raoul Berger*, 28 HOW. L.J. 913 (1985), *reprinted in* 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 234-35 (Randy E. Barnett ed., 1989); Randall R. Murphy, *The Framer's Evolutionary Perception of Rights: Using International Human Rights Norms as a Source for Discovery of Ninth Amendment Rights*, 21 STETSON L. REV. 423, 426 (1992); Norman Redlich, *Are There "Certain Rights...Retained by the People?"*, 37 N.Y.U. L. REV. 787 (1962), *reprinted in* 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 127, 145 (Randy E. Barnett ed., 1989); Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth, But What On Earth Can You Do with the Ninth Amendment?*, 64 CHI.-KENT L. REV. 67 (1988); Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759, 762 (1994). Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 179-82 (1992); John C. Yoo, *Our Declaratory Ninth Amendment,* 42 EMORY L.J. 967, 969 (1993).

rights that might be included within the purview of the Ninth Amendment, and how may they be identified, interpreted, and applied? This issue has received considerably less treatment in the scholarly literature.[9]

To a large extent, our views on what unenumerated rights the Ninth Amendment might yield will be governed by our views on constitutional interpretation in general. This is in no way surprising. The Ninth Amendment, however, is a particularly fertile ground for interpretation, in that the very enigmatic character of its language provides a platform for the application of theory in ways that more concrete and narrow provisions of the Constitution do not. It may, in fact, be the very expansiveness of the Ninth Amendment's language that has proved to be a barrier to its use. Without any sort of guide as to how the rights to which it refers can be discerned or used, any principled use of the Ninth Amendment becomes a daunting prospect.

The purpose of this article is to examine the ways in which we might think about identifying, interpreting, and applying unenumerated rights under various types of constitutional argument, using as tools for this examination the types of argument identified by Philip Bobbitt in his landmark book,

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[9] *See* BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955); Barnett, *supra* note 8, at 35-46; Barber, *supra* note 8, at 60-65; Charles L. Black, Jr., *On Reading and Using the Ninth Amendment, in* POWER AND POLICY IN THE QUEST OF LAW: ESSAYS IN HONOR OF EUGENE ROSTOW (1985), *reprinted in* 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 337, 340-41, 346-49 (Randy E. Barnett ed., 1989); Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936); Stephen C. Macedo, *Reasons, Rhetoric, and the Ninth Amendment: A Comment on Sanford Levinson*, 64 CHI.-KENT. L. REV. 163 (1988), *reprinted in* 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 154 (Randy E. Barnett ed., 1989); Levinson, *supra* note 5, at 121-45; Massey, *supra* note 8, at 312-43; McIntosh, *supra* note 8, at 243-45; Derrick Alexander Pope, *A Constitutional Window to Interpretive Reason: Or In Other Words . . . The Ninth Amendment*, 37 HOW. L.J. 441, 458 (1994); Redlich, *supra* note 8, at 145-47; Eugene M. Van Loan III, *Natural Rights and the Ninth Amendment*, 48 B.U. L. REV. 1 (1968), *reprinted in* 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 164, 165-66 (Randy E. Barnett ed., 1989); Yoo, *supra* note 8, at 968.

Constitutional Fate. In *Constitutional Fate*, Bobbitt sets out what he termed to be the five traditional types or "modalities" of constitutional argument: historical, which relies on the intentions of the Framers and Ratifiers of the Constitution; textual, which looks at the present meaning of the words used in the Constitution; structural, which infers meaning from the relationships that the Constitution's structure sets up; prudential, which advances particular ideals according to the practical wisdom of doing so; and doctrinal, which applies rules generated by precedent.[10] Bobbitt also argues for the existence of a sixth modality, which he terms ethical, and describes as relying on the "characterization of American institutions and the role within them of the American people."[11] According to Bobbitt, all of these modalities are legitimate methods of Constitutional argument, and one modality is not necessarily better than any other. Bobbitt also believes, however, that these six modalities encompass the entire field of constitutional legal arguments that are recognized as valid, and there are no valid external arguments.[12]

Although *Constitutional Fate* was written in 1982, the importance of Bobbitt's modalities to constitutional theory has not diminished. Instead, both of Bobbitt's "modalities" works, *Constitutional Fate* and its 1991 offspring, Bobbitt's *Constitutional Interpretation*, play an important role in how we come to understand the different modes of constitutional interpretation and argument.[13] While other authors have used the modalities as a basis for understanding other amendments,[14] no one has yet comprehensively undertaken to look at the Ninth Amendment in this manner.[15]

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[10] PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7-8 (1982) (hereinafter BOBBITT, FATE). *See also* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-22 (1991) (hereinafter BOBBITT, INTERPRETATION) (restating these modalities).

[11] BOBBIT, FATE, *supra* note 10, at 93-94. In an illustration of his reasoning for the concept of an ethical modality, Bobbitt states that if each of the five traditional modalities was assigned to a different colored pencil, and the pencils were used to mark through passages of United States Supreme Court cases encompassing those various modalities, there would still be patches of uncolored text containing "expressions of considerable passions and conviction" which are based on the American ethos. *Id.*

[12] BOBBITT, INTERPRETATION, *supra* note 10, at 22. Bobbitt notes that there are other modalities of argument, such as basing judicial determinations on kinship, appeals to religion, or random chance, but states that such arguments are simply not recognized as valid within our particular legal system. BOBBITT, FATE, *supra* note 10, at 6.

I realize that the distinctions created by using these argument forms to interpret the Ninth Amendment are somewhat artificial. As Bobbitt notes, these forms are actually "archetypes," and most constitutional arguments have aspects of more than one type.[16] Further, many modalities share characteristics.[17] However, my hope is that by examining each of these archetypical constitutional modalities on its own, and by considering the possibilities and limitations that each modality places on the existence, identification, interpretation, and application of unenumerated rights, we can better understand the legitimate ways in which the concept of unenumerated rights can play a role in our constitutional system.

The purpose of this article is not to convince the reader that unenumerated rights should be found using any particular modality or combination of modalities. Rather, the purpose is to provide a way to some common ground on which the concept of unenumerated rights can be debated, and the Ninth Amendment, in the words of Charles L. Black, Jr., "having been proposed by the requisite majorities in Congress, and ratified by the requisite number of states, . . . [may] at long last be adopted."[18]

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[13] *See* JOHN H. GARVEY, T. ALEXANDER ALEINIKOFF & DANIEL A. FARBER, MODERN CONSTITUTIONAL THEORY: A READER 4-12 (5th ed. 2004) (using the modalities explanation from CONSTITUTIONAL INTERPRETATION to discuss the nature of constitutional theory); DAVID CRUMP, EUGENE GRESSMAN & DAVID S. DAY, CASES AND MATERIALS ON CONSTITUTIONAL LAW 85-87 (4th ed. 2004) (using the modalities to illustrate constitutional interpretation).

[14] *See, e.g.*, Sanford Levinson, Comment, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989) (using Bobbitt's modalities to explore the interpretation of the Second Amendment).

[15] Calvin R. Massey does undertake a cursory examination of some of the modalities as they relate to the Ninth Amendment in his book *Silent Rights*. *See* CALVIN R. MASSEY, SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS 14-16 (1995). However, this is not the focus of the book, which instead attempts to sketch out a "coherent theory of the Ninth Amendment, one that makes sense of its history, text and structural role in the Constitution, and one that responds to the doctrinal necessities of a principled quest for constitutionally guaranteed unenumerated rights." *See id.* at 16-17.

[16] *See* BOBBITT, FATE, supra note 10, at 7.

[17] For example, doctrinal tests may be developed through an appeal to historical or textual arguments, and may also be developed through ethical means.

II. HISTORICAL ARGUMENT

As noted above, historical argument is argument which attempts to "marshal the intent of the draftsmen of the Constitution and people who adopted the Constitution."[19] With regard to the Ninth Amendment, the application of this modality seeks to ascertain the "original intent" of the Framers and Ratifiers with regard to the rights "retained by the people."

In examining the historical argument, my concern is not directed towards determining whether the Framers and Ratifiers intended that the Ninth Amendment actually establish unenumerated rights that could be enforced by a court. As noted above, there is already a large body of work on that subject.[20] Rather, I wish to address a more neglected question: if we believe that the Framers and Ratifiers intended the Ninth Amendment to protect unenumerated rights, what did they envision such rights to be? However, in answering this question from a historical standpoint, the manner in which the Ninth Amendment, and indeed the entire Bill of Rights, came into being is just as important as it is to the question of whether the Ninth Amendment establishes unenumerated rights at all.

The place to begin a search for the original intentions regarding the Ninth Amendment is with the state ratification conventions. The draft of the Constitution that emerged from the Convention did not contain a bill of rights; in fact, the Convention had expressly rejected the idea of adding such a provision.[21] Rather, the necessity of adding a bill of rights became apparent in the state ratification conventions.

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[18] CHARLES L. BLACK, JR., DECISION ACCORDING TO LAW 43 (1981).

[19] BOBBITT, FATE, *supra* note 10, at 7.

[20] *See supra* notes 7-8 and accompanying text.

To the Federalist supporters of the Constitution, it soon became clear that the lack of a bill of rights would be the largest obstacle to ratification.[22] So-called "Antifederalists" feared that under this new Constitution, the national government would trample upon the rights of the states and the citizenry, including the individual rights guaranteed either by declaration or reservation in the state constitutions.[23] Further, they were concerned that any rights not expressly reserved in the Constitution would eventually be overridden by the national government in the course of the exercise of its delegated powers.[24]

Against this argument by the Antifederalists, the Federalists contended that no bill of rights was necessary because the government established by the Constitution was one of only limited powers, and therefore, any powers not expressly delegated would be reserved.[25] The Federalists further argued a bill of rights might actually be dangerous, in that it would tend to support the very supposition feared by the Antifederalists: that only the rights expressly enumerated in the bill of rights were retained, and that all other rights were ceded to the national government.[26]

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[21] *See* PATTERSON, *supra* note 9, at 6; MARK N. GOODMAN, THE NINTH AMENDMENT: HISTORY, INTERPRETATION AND MEANING 17-18 (1995). A call to add a bill of rights was made on September 12, 1787, by George Mason of Virginia, who was responding to a question raised by Mr. Gorham of Massachusetts as to how the right of jury trial was to be guaranteed. Elbridge Gerry of Massachusetts made a formal motion for the preparation and addition of such a bill, which Mason seconded, but the motion was denied. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 587-88 (Max Farrand ed., 1937). Two days later, on September 14, Gerry, along with Charles Pinckney, attempted to insert a provision guaranteeing freedom of the press. This motion was also defeated. *Id.* at 617-18. *See* GOODMAN, at 17. A proposal for a bill of rights was introduced on several other occasions, but never again came to a vote. PATTERSON, *supra* note 9, at 9. Patterson contends that one of the principal reasons that Gerry, Mason, and Randolph refused to sign the Constitution was that it did not include a bill of rights. *Id.* at 8.

[22] GOODMAN, *supra* note 21, at 18; *see also* Leslie W. Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 629 (1956).

[23] MASSEY, SILENT RIGHTS, *supra* note 15, at 57-58.

[24] *Id.* at 58. Massey notes a statement by Patrick Henry, who feared that in the absence of some sort of bill of rights, the generally accepted construction that "all rights not expressly and unequivocally reserved to the people are impliedly and incidentally relinquished to rulers, as necessarily inseparable from the delegated powers" would prevail. The Virginia Debates (June 14, 1788) (statement of Patrick Henry), *in* 3 ELLIOT'S DEBATES 445 (Jonathon Elliot ed., Philadelphia, J.B. Lippincott Co. 1937) (1826).

Despite these arguments by the Federalists, however, the Antifederalist arguments eventually won out.[27] The Antifederalists persuasively argued that the Constitution contained clauses which gave the national government powers to act for the "general welfare" or where "necessary and proper"; clauses which could be a source of expansive power.[28] Further, the Antifederalists pointed out that some rights had already been expressly enumerated in the body of the Constitution, such as the right to jury trial in criminal cases, the right to habeas corpus, and the prohibition of ex post facto laws. This prior enumeration countered the Federalist argument that the enumeration of rights was dangerous.[29] Another point in favor of the Antifederalist position was that the Federalist position required substantial "mental gymnastics" to demonstrate that a bill of rights was unnecessary.[30] As Patrick Henry pointed out, although under the logical construction and assurances asserted by the Federalists, a bill of rights might not be necessary:

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[25] *See generally* THE FEDERALIST NO. 23 (Alexander Hamilton).

[26] *Id.* Charles Wilson also expressed this fear at the Pennsylvania ratification convention, noting that

> A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.

The Pennsylvania Debates (Nov. 20, 1787) (statement of Charles Wilson, *in* 2 ELLIOT'S DEBATES 436 (Jonathon Elliot ed., Philadelphia, J.B. Lippincott Co. 1937) (1826) (emphasis omitted). Others making this same point included James Iredell in the North Carolina ratification convention and James Madison in the Virginia ratification convention. *See* MASSEY, SILENT RIGHTS, *supra* note 15, at 61-64.

[27] *See* MASSEY, SILENT RIGHTS, *supra* note 15, at 64-65; PATTERSON, *supra* note 9, at 9. Patterson argues that Alexander Hamilton's statements that enumerating rights would be dangerous, rather than reassuring the Antifederalists, actually made them more suspicious. PATTERSON, *supra* note 9, at 9.

[28] MASSEY, SILENT RIGHTS, *supra* note 15, at 65.

[29] *Id.*

> [I]f you had a thousand acres of land dependant on [the answer to the question of rights], would you be satisfied with logical construction? Would you depend upon a title of so disputable a nature? The present opinions of individuals will be buried in entire oblivion when those rights will be thought of.[31]

The result of the persuasiveness of the Antifederalist reasoning was a tacit agreement that, upon ratification, a bill of rights sufficient to meet the objections of the Antifederalists would be proposed at the first session of Congress.[32] Many of the state ratification conventions also proposed amendments to the Constitution, including some that foreshadowed the Ninth and Tenth Amendments.[33]

Soon after the first Congress opened session, Madison introduced a group of amendments to the Constitution.[34] Included in this group was the proposal that eventually became the Ninth Amendment, which at that point stated:

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[30] GOODMAN, *supra* note 21, at 26-28.

[31] The Virginia Debates (June 12, 1788) (statement of Patrick Henry), *in* 3 ELLIOT'S DEBATES 318 (Jonathon Elliot ed., Philadelphia, J.B. Lippincott Co. 1937) (1826); *see also* GOODMAN, *supra* note 21, at 27-28 (quoting Henry's speech).

[32] PATTERSON, *supra* note 9, at 9.

[33] GOODMAN, *supra* note 21, at 4-6; Dunbar, *supra* note 22, at 631-32. An example of these proposed amendments is one from the Virginia convention, which proposes:

> That those clauses which declare that Congress shall not exercise certain powers, be not interpreted in any manner whatsoever, to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.

The Virginia Debates (June 27, 1788) (proposed amendment to the Constitution), *in* ELLIOT'S DEBATES 661 (Jonathon Elliot ed., Philadelphia, J.B. Lippincott Co. 1937) (1826).

[34] PATTERSON, *supra* note 9, at 10-11; GOODMAN, *supra* note 21, at 7.

> The exceptions here or elsewhere in the [C]onstitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the [p]eople, or as to enlarge the powers delegated by the [C]onstitution; but either as actual limitations of such powers, or as inserted merely for greater caution.[35]

Madison explained this part of his proposal by stating that:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.[36]

Madison's proposal was referred to a select committee. The version of the Ninth Amendment that came out of committee was identical to the final amendment, except for the change of the word "this" to "the" and the placement of a comma, and stated simply that: "[t]he enumeration in this Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."[37] The final form of the amendment was adopted without further incident.[38]

From this history of the passage of the Ninth Amendment, it appears, at the very least, that Madison and the other members of the First Congress had some idea that they possessed some sort of unenumerated rights that could not be infringed upon by the Constitution. Unfortunately, the history does not tell us what those specific rights might be. Legal scholars, however, have advanced several theories for finding these specific rights. The bundles of rights identified by these theories range in scope from fairly restrictive to nearly infinite.

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[35] 1 ANNALS OF CONG. 452 (Joseph Gales ed., 1790).

[36] *Id.* at 456.

[37] *Id.* at 754.

[38] *See* PATTERSON, *supra* note 9, at 14-15; Dunbar, *supra* note 22, at 632.

A. State Law Theory

The most restrictive of these historically-based theories argues that the rights the Framers and Ratifiers meant to be "retained" by the people were the rights which they had possessed under state constitutions and laws. Proponents of this "state law" theory include Russell Caplan[39] and Gregory Allen.[40] The theory is also prominent, although not exclusive, in the "originalist" method of identifying and enforcing rights under the Ninth Amendment discussed by Randy Barnett,[41] as well as in the writing of Calvin Massey.[42] Even the unenumerated rights-skeptic Robert Bork grudgingly admits that this might be a correct interpretation of what the Ninth Amendment was designed to protect, although he would deny the courts power to enforce such rights.[43]

State law theories are based upon the conception of the Bill of Rights as an Antifederalist attempt to preserve the rights which states had reserved in their own constitutions and laws.[44] Support for this view is derived, in true historical fashion, from comments made during the ratification conventions suggesting the need for a bill of rights to protect the individual rights which were already granted in state laws and constitutions.[45] The most ardent proponents, such as Russell Caplan, see these rights as exclusive, and deny that the "rights retained" were "natural law" rights, except in so far as state law expressly incorporated these rights.[46]

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[39] *See generally* Caplan, *supra* note 7.

[40] Gregory Allen, *Ninth Amendment and State Constitutional Rights*, 59 ALB. L. REV. 1659 (1996).

[41] Barnett, *supra* note 8, at 35-37. Barnett discusses three methods in this work: the originalist method, which depends upon the rights expressed in state constitutions and works contemporary with the Framing; the constructive method, which uses historical and hypothetical examples to construct a method of adjudication that can be applied to rights; and the presumptive method, which attempts to replicate the rights of man under natural law. *Id.* at 34-44. Barnett has recently expanded on these methods in his book, *Restoring the Lost Constitution: The Presumption of Liberty*. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 232-273 (2004).

[42] Massey, *Federalism and Fundamental Rights*, *supra* note 8, at 309-18. Massey, however, takes a prudential view of discovering "negative" rights, using natural law. *See infra* note 147 and accompanying text.

[43] BORK, *supra* note 7, at 183-85.

[44] *See* Caplan, *supra* note 7, at 259.

In order to determine what rights are "retained" by the people under the "state law" theory, it is only necessary to ask whether the right was one that was protected by state constitution or law at the time of the adoption of the Bill of Rights. This approach creates a clearly identifiable bundle of rights that can be easily applied. The nature of these rights is somewhat odd, however, in that they are based only on the laws and rights which existed in the state constitutions at the time of adoption. Thus, any rights which states added to their constitutions after the Framing are presumably not included in the bundle of rights in the Ninth Amendment although any rights deleted after the Framing would be in the bundle. Further, there is the question of whether the Ninth Amendment was intended to incorporate every right in every state constitution, or whether there should perhaps be a requirement that the right be present in more than one state constitution for it to be recognized as a right "retained by the people."

But perhaps the most important question raised by the "state law" theory is: given that the rights are secured in state laws and constitutions as rights against state power, can they be asserted against the Federal Government?[47] For example, the New Hampshire state constitution contained, at the time of the adoption of the Federal Constitution (and still does today), a provision stating that "[a]ll penalties ought to be in proportion to the nature of the offense."[48] No such proportionality guarantee exists in the Federal Constitution other than the Supreme Court's Eighth Amendment jurisprudence. Congress is free to pass criminal provisions which provide for punishment that is not necessarily "proportional" to the offense. What would happen if Congress passed such a provision? Absent the Ninth Amendment, the Supremacy Clause would operate to allow the federal provision to be enforced, notwithstanding the state right.[49] However, if the Ninth Amendment was meant to somehow include the rights secured by state constitutions and laws at the time of the adoption of the Federal Constitution, does this mean that the state right is somehow supreme? If so, how?

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[45] *See, e.g.*, Caplan, *supra* note 7, at 245-48 (quoting statements by George Mason and Patrick Henry regarding the need of a bill of rights to protect laws incorporated in state constitutions).

[46] *Id.* at 259-60 n.156.

[47] This is the reverse of the usual question with regard to the enumerated rights in the Constitution, which were presumably intended to operate only against the Federal Government.

Russell Caplan is of the opinion that any state law rights incorporated in the Ninth Amendment cannot be enforced against the Federal Government. He argues that the Supremacy Clause would necessarily forbid state law from constraining Congress unless state law norms could somehow be incorporated into the Constitution.[50] However, such incorporation would be incomprehensible since the rights would then act not only as a constraint against the Federal Government, but also against the states themselves.[51] He contends that this would be an anomalous result, as the original purpose of the Ninth Amendment was to protect the enactments of the states rather than to circumscribe them.[52] Rather, according to Caplan, the unenumerated state rights under the Ninth Amendment serve only to show that the Bill of Rights did not impair the ability of states to make their own rights for their own citizens, even if they could not be enforced against the Federal Government.[53]

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[48] N.H. CONST. pt. 1, art. XVIII (effective 1784).

[49] *See* U.S. CONST. art. VI, § 2 (stating that "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . . any thing in the Constitution or laws of any state to the contrary notwithstanding.").

[50] Caplan, *supra* note 7, at 261-62.

[51] *Id.*

[52] *Id.*

Calvin Massey, while acknowledging that the problems identified by Caplan exist, does not see them as an insurmountable problem.[54] He argues that if the Ninth Amendment was intended to protect against federal encroachment against state rights, it is "readily inferable" that the Framers intended the Supremacy Clause to be displaced regarding those rights existent at the time of the adoption of the Constitution.[55] With regard to application against the states, Massey argues that the incorporation doctrine can be utilized without fear of contradiction since the result would simply require the state to obey its own law.[56] Furthermore, according to Massey, the Guarantee Clause could also be used to enforce such rights.[57]

There seems to be an inherent problem with Massey's argument. In using either the incorporation doctrine or the Guarantee Clause to apply unenumerated Ninth Amendment rights based on state law to the states, courts would not be simply requiring each state to abide by its own laws. Instead, they would be requiring each state to abide by a combination of its own laws and the laws of other states regarding rights which existed at the time of the adoption of the Constitution. While this may or may not be a good idea, it does not solve the problem of application of such rights to the states as neatly as Massey seems to think.

The "state law" theory of the source of unenumerated rights has been criticized on historical grounds by some scholars who believe that the notion that the Bill of Rights was necessary to protect state laws from federal authority is overblown.[58] Nevertheless the attractiveness of the theory to those who would seek to limit the reach of unenumerated rights is undeniable. The theory yields a fixed and unchanging set of rights which can be easily identified and implemented.

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[53] *Id.* at 264-65.

[54] Massey, *Federalism and Fundamental Rights*, *supra* note 8, at 312-18.

[55] *Id.* at 325.

[56] *Id.* at 327.

[57] *Id.* at 328.

[58] *See, e.g.*, Sager, *supra* note 8, at 245 (arguing that the idea that the Constitution could have preempted individual state law rights "seems fantastic").

B. Natural Rights

By far the more popular candidates for the bundle of rights to which the Ninth Amendment might refer under an historical approach have to do with natural law philosophy. In attempting to find sources for Ninth Amendment rights, many scholars have focused on the natural law sources with which the Framers and Ratifiers would have been familiar: the works of Edward Coke, John Locke, and William Blackstone.[59]

Such a natural law based theory was espoused by Knowlton H. Kelsey in his seminal 1936 article, *The Ninth Amendment of the Federal Constitution*, which was the first article to focus exclusively on the Ninth Amendment. In his article, Kelsey argued that the "rights retained" under the Ninth Amendment are what he termed "the natural . . . rights of Englishmen," and that the source of these rights is not the "theoretical or philosophic classification by Bentham, Austin or any other critic," but is instead the teachings of Blackstone, with which the Colonists would have been familiar.[60] He buttressed this argument with two late-nineteenth century Supreme Court cases which refer to the Bill of Rights as an attempt to set forth certain important rights of Englishmen, with the inference that the Ninth Amendment should be similarly construed according to English law.[61]

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[59] *See* Kelsey, *supra* note 9, at 313-14; J.D. Droddy, *Originalist Justification and the Methodology of Unenumerated Rights*, 1999 MICH. ST. L. REV. 809, 829-33; Sanders, *supra* note 8, at 800.

[60] Kelsey, *supra* note 9, at 313-14. Kelsey notes that in the Colonial period, nearly as many of *Blackstone's Commentaries* were sold in America as in England. *Id.* at 313.

[61] *Id.* at 314. In *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897), the Court stated that "[t]he law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors." Similarly, in *Brown v. Walker*, 161 U.S. 591, 600 (1896), the Court noted that "the object of the first eight amendments to the Constitution was to incorporate into the fundamental law of the land certain principles of natural justice which had be-

Under Kelsey's formulation of rights, a judge who sought to determine whether a particular right was "retained" under the Ninth Amendment would look at whether it was one of the rights which Blackstone counted as natural rights of Englishmen. In articulating these rights, Blackstone broke them down into three primary categories: (1) the right of personal security, which he defined as consisting of "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation"; (2) the right of personal liberty, which he defined as "the power of locomotion; of changing situation, or moving one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law"; and (3) the right of private property, defined as "the free use, enjoyment, and disposal of all [a person's] acquisitions, without any control or diminution, save only by the laws of the land."[62]

Blackstone, however, is not the only source for those advocating a natural law based theory of the Ninth Amendment. J.D. Droddy argues that while Blackstone was certainly an influential source in the colonists' understanding of their rights, others, such as Locke, Coke, and Samuel Pufendorf should also be considered when looking for sources of the colonists' understanding.[63] Droddy contends that all of these sources can be looked to when attempting to ascertain the rights protected by the Ninth Amendment.[64]

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come permanently fixed in the jurisprudence of the mother country, the construction given to these principles by the English courts is cogent evidence of what they were designed to secure and of the limitations that should be put upon them." In neither case does the Court give any citation for these premises which, it should be noted, appear nearly one hundred years after the adoption of the Bill of Rights.

[62] WILLIAM BLACKSTONE, 2 COMMENTARIES *121, *129.

[63] Droddy, *supra* note 59, at 830-32; *see also* Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law (Pt. 2)*, 42 HARV. L. REV. 365, 383 (1928) (crediting Locke's influence on the Constitution); Jason S. Marks, *Beyond Penumbras and Emanations: Fundamental Rights, the Spirit of the Revolution, and the Ninth Amendment*, 5 SETON HALL CONST. L.J. 435, 475-77 (1995) (arguing for Pufendorf's influence on the Constitution).

[64] Droddy, *supra* note 59, at 830-32.

The addition of these philosophers as a source for natural rights would lead to a larger category of rights than those achieved by reliance on Blackstone alone. For example, Pufendorf's ideas of the rights of men are related to the concept of the right of the person to self-actualization. His formulation, like Blackstone's, is divided into three categories: (1) "equal personal liberty," such as "control over one's body and mind, freedom of thought, and movement limited only by the finite possibilities of an individual's life and the boundary of noninterference with other individuals' enjoyment of the same franchise"; (2) equal economic liberty," such as "the freedom to choose the channel of self-development, to possess the fruits of one's labor through property ownership, and to claim against the state the de minimis resources necessary to have the opportunity to achieve one's life pursuits"; and (3) "equal social liberty . . . to share in the . . . benefits [of the] community."[65] Using Pufendorf as a source for the Framers' concept of the "rights retained" in the Ninth Amendment, would then raise the question of whether such rights included positive rights which might be considered necessary for self-actualization, such as the right to education or housing.[66]

An example of how these sources of unenumerated rights might be used in practice is provided by Droddy, who shows how a judge using these broad categories as a basis for unenumerated rights might decide the right to privacy cases *Griswold v. Connecticut* and *Roe v. Wade*.[67] Droddy begins with *Griswold*, and immediately concedes that nowhere in the historical record is the concept of contraception addressed.[68] However, this does not end his inquiry. Rather, he asks what value inherent in the contraception issue might have been protected by the original understanding of the Framers and Ratifiers.[69] From the writings of Locke, he pulls a general right of privacy in marital sexual relations which would support the idea that access to contraception is a fundamental right, validating the Court's decision in *Griswold*.[70] With regard to the asserted right of abortion, however, Droddy finds a more specific prohibition in the writings of both Blackstone and Pufendorf and thus concludes that there is no fundamental right to an abortion, calling into question the decision in *Roe*.[71]

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[65] Marks, *supra* note 62, at 475-76; *see also* SAMUEL PUFENDORF, OF THE LAW OF NATURE AND NATIONS (Basil Kennett trans., 4th ed. 1729).

[66] *See* Marks, *supra* note 62, at 476. Marks contends that the natural rights envisioned by Pufendorf include the right to "education subsidies, affordable housing, quality health care, and meaningful access to media in the marketplace of ideas." *Id.* at 476 n.144.

[67] Droddy, *supra* note 59, at 860-62.

[68] *Id.* at 860.

Droddy's example highlights one of the problems that judges would still be faced with in using an historical method which bases its conception of unenumerated rights in the writings of natural law philosophers: choosing the level of abstraction at which to view the right. This level has great importance in determining whether the right exists. Had neither Blackstone nor Pufendorf spoken specifically on the issue of abortion, there would at least be an argument that Blackstone's right of personal security, which includes the right of a person to have control over his (or, more to the point, her) body, is broad enough to incorporate a right to an abortion on demand.[72]

It is one plausible reading from the historical evidence available that, in speaking of the "rights retained" in the Ninth Amendment, the Framers and Ratifiers had in mind a bundle of rights which corresponded to what natural law scholars such as Blackstone and Pufendorf thought of as the rights of man. In most cases, however, this bundle of rights is articulated at a very general level which gives judges a large degree of discretion in identifying and applying rights. Although the class of available rights is a closed one, it is also a fairly large one.

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[69] *Id.* at 861.

[70] *Id.* The actual passage from Locke's writings cited by Droddy reads:

> For all the ends of marriage being to be obtained under politic government, as well as in the state of nature, the civil magistrate doth not abridge the right or power of either naturally necessary to those ends, viz. procreation and mutual support and assistance whilst they are together; but only decides any controversy that may arise between man and wife about them.

Id. (quoting JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 83 (C.B. McPherson ed. 1980)).

[71] *Id.* at 861-62. It should be noted that Droddy is not actually arguing that *Roe* was wrongly decided. Rather, he is simply demonstrating the way in which an originalist method could be used to decide cases. *Id.* at 862 n.287.

[72] *See* BLACKSTONE, *supra* note 62, at *129-34.

A final candidate for a historical bundle of rights based on natural law, however, has an even broader scope. Under this reading of the Framers' conception of natural rights, based on what Randy E. Barnett terms the "classical liberal theory of rights," it is not possible to determine exactly what the complete set of the "rights retained by the people" encompasses.[73] Rather, the rights are defined by "the sphere of moral jurisdiction that persons have over certain resources in the world—including their bodies," and within this sphere, their rights are absolute and innumerable.[74] Barnett notes that this view has support among the Framers who were adherents of natural rights, and was a primary argument of the Federalists as to why no bill of rights should be included in the Constitution.[75]

The question raised by the prospect of innumerable unenumerated rights is how these rights would ever be identified and given force. Barnett's answer is what he calls a "presumptive method."[76] Under this method, the Ninth Amendment establishes a general constitutional presumption in favor of individual liberty; that is, the freedom of the individual to act within the boundaries of what may be characterized as "rightful conduct."[77] Legislation which is in derogation of individual liberty is presumed to violate the Ninth Amendment unless justified by the same meaningful scrutiny that is given to enactments infringing upon enumerated rights.[78]

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[73] *See* Barnett, *supra* note 8, at 40. As previously noted, this is one of three methods which Barnett proposes as possible ways in which the Ninth Amendment can be given force. *See supra* note 41 and accompanying text.

[74] Barnett, *supra* note 8, at 40.

[75] *Id.* James Wilson argued at the Pennsylvania ratification convention that while "all the political writers, from Grotious and Pufendorf down to Vattel" had written on the subject of rights, none had made a complete enumeration of the rights of the "people as men and as citizens." The Pennsylvania Debates (Dec. 4, 1787) (statement of James Wilson), *in* 4 ELLIOT'S DEBATES 454 (Jonathon Elliot ed., Philadelphia, J.B. Lippincott Co. 1937) (1826). Similarly, James Iredell argued in the North Carolina convention that

> [I]t would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up . . . it would be impossible to enumerate everyone. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.

The North Carolina Debates (July 29, 1788) (statement of James Iredell), *in* 4 ELLIOT'S DEBATES 167 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 1937) (1826).

Thus, through the use of the historical modality, it is possible to identify a certain bundle of rights that the Framers and Ratifiers might have been thinking about as the "rights retained by the people" in the Ninth Amendment. However, the candidates for this bundle offer dramatically different conceptions of rights. While it is possible that the Framers and Ratifiers had one of these bundles in mind, historical evidence does not conclusively show which one that might have been.

III. TEXTUAL ARGUMENT

Bobbitt defines textual argument as argument "drawn from a consideration of the present sense of the words of the provision."[79] He states that "[t]extual arguments rest on a sort of ongoing social contract, whose terms are given their contemporary meanings continually reaffirmed by the refusal of the People to amend the instrument."[80] Thus, the textualist does not ask what the original intent of the Framers, or anyone else, was in including a certain provision within the Constitution. Instead, the textualist asks what the meaning of the text actually used in the Constitution is, a result that can vary from what the Constitution may have meant to a person in the Framers' day.[81]

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[76] *See* Barnett, *supra* note 8, at 39-42.

[77] *Id.* at 41.

[78] *Id.* I have included Barnett's presumptive method in the historical section because his general theory is historical; that is, his presumptive method is genuinely trying to implement rights in the manner in which he believes the Framers would have wanted them to be implemented. Nonetheless, his presumptive method itself is actually more doctrinal, in that it establishes a neutral, generally applicable test for finding these rights. *See id.* at 39-42.

[79] BOBBITT, FATE, *supra* note 10, at 7.

[80] *Id.* at 26.

In the context of the Ninth Amendment, this type of argument presents a quandary. It is possible for the textualist to look at the Ninth Amendment and to determine that the clear meaning of the text is that there are rights which are unenumerated in the Constitution but are nonetheless worthy of protection in the same manner as if they had been enumerated therein. The problem is that the text gives no indication of what those rights might be; in fact, it expressly directs the person searching for those rights to look outside the text to find them.[82] As Professor Lawrence Sager notes, the textualist who confronts the Ninth Amendment has essentially two choices. The first choice is to ignore the Ninth Amendment entirely.[83] However, this choice is intellectually dishonest, in that the textualist is not free to simply ignore certain parts of the Constitution.[84] The second choice is to find a way to work around the apparent contradiction.[85] Sager suggests that one avenue would be for the textualist to consciously repudiate the directive of the Ninth Amendment to look outside the text as inconsistent with the requirements of the Constitution.[86] In doing so, Sager states, the textualist "would not be simply ignoring the amendment, but rather making a studied judgment that the same foundational commitment which draws [the textualist's] allegiance to the Constitution requires that [he or she] disregard some of its stipulations."[87]

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[81] *See* BOBBITT, INTERPRETATION, *supra* note 10, at 14. The essence of this distinction is exemplified by an examination of the jurisprudence of Justice Antonin Scalia. Although Scalia refers to himself as a textualist, his preferred method of argument is actually a mix of the textual and historical modalities: His inquiry is to what the Framers intended the text to mean. *See generally* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann ed., 1997).

[82] *See* Sager, *supra* note 8, at 256 (noting the textualist's dilemma).

[83] *Id.* at 257.

[84] *See id.*

[85] *Id.*

[86] *Id.* at 257-58.

John Hart Ely believes that the Ninth Amendment causes unsolvable problems for textualists. He argues that a textualist would be reduced to arguing that the Ninth Amendment should be disregarded as an anachronism in the same way that we might today disregard an amendment which mandated the protection of ghosts.[88] Ely's "protection of ghosts" metaphor is somewhat similar to Robert Bork's statement before the Senate judiciary committee that it was not possible to give effect to unenumerated rights in the Ninth Amendment because "if you had an amendment that says 'Congress shall make no' and then there is an ink blot, and you cannot read the rest of it and that is the only copy you have, I do not think the Court can make up what might be under the ink blot . . . ."[89]

It appears that all of these textualist arguments are flawed, in that each requires that the idea that the Ninth Amendment protects unenumerated rights be abandoned, even though it is a plausible reading of the text. This situation highlights one of the problems of pure textualism, which is that it relies solely on the text of the Constitution, while the Ninth Amendment flatly contradicts this reliance.[90]

Thus, there appears to be no way in which the "rights retained by the people" in the Constitution can be given form under a strict textual modality. For the strict textualist, however, this might not necessarily be a bad thing. The strength of the textual modality is in its determinacy and its ability to provide a basis for decisions that does not rely on partisan politics and the whims of the judiciary. Thomas Grey compares a strict textual reading of the Constitution to the rule that requires provisions of wills to be put in writing.[91] According to Grey, wills are required to be strictly textual because there is a preference in the doctrine of wills for what he calls "errors of formality" over "errors of informality." In other words, it is considered better that an intended bequest wrongly fail because of insufficient formality than that the testator's intent be wrongly interpreted because of either false or badly interpreted parol evidence.[92] In the case of a bequest that wrongly fails, there is a backup mechanism, the law of intestate succession, which operates to distribute the testator's estate to the most natural objects of his or her bounty, but in the case of a bequest wrongly interpreted based on parol evidence, there is no such backup system. Hence, the incentive in the case of a will is to force any changes which depart from the standard to be in writing.[93]

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[87] *Id.* Sager also finds this approach to be indefensible. *Id.* at 258-59.

[88] *See* ELY, *supra* note 1, at 38-40.

[89] The Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong. 249 (1989) (statement of Robert H. Bork, United States Circuit Court Judge for the District of Columbia Circuit).

[90] *See* Sager, *supra* note 8, at 258.

[91] Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L.

Applying Grey's will analogy to the Ninth Amendment then, the strict textualist interpretation favors the error of formality, which is that rights which were meant to be protected will not be because they were not specifically enumerated, over the error of informality, which is that rights which were not meant to be protected will be simply because a judge decides that they should be. In the case of the former errors, a backup mechanism exists: the enumerated rights of the Constitution protect many important rights and the democratic process can function to protect others if necessary. For errors of informality however, there is no such backup mechanism; rather, the erroneous creation of new rights takes them out of the realm of the democratic system. Thus, for the strict textualist, the fact that the Ninth Amendment's purpose cannot be realized, while troubling, is the price that must be paid for the

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REV. 211, 226 (1988).

[92] *Id.* Such mistakes of informality can occur, for example, where "a genuine testamentary intention was wrongly determined to exist, by virtue of fraud or mistake, on the basis of informal evidence; or in which effect was given to an ill-considered intention that would have been changed had it been subjected to the 'sober second thought' induced by the solemnity of writing." *Id.*

[93] *Id.* Grey criticizes the strict textualist approach, and argues that his "supplemental approach" is a more workable method of interpreting the Constitution. This approach is a blend of modalities in which the textual modality is predominant, but other modalities such as the historical and doctrinal are used to give "context" to the meaning of the text. *See id.* at 214.

determinacy of the "ongoing social contract."[94]

If strict textualism cannot provide us with an answer regarding what rights might be "retained by the people," is there perhaps a variant of textualism that can? One candidate is Akhil Reed Amar's idea of "intratextualism."[95] Rather than simply reading a constitutional provision or clause in isolation based on the contemporary understanding of the words used, the intratextualist attempts to read the words or phrases in conformity with other passages of the Constitution that use the same or similar words and phrases.[96] The purpose of this conception is to move beyond the "blinkered" textualist practice into a more holistic interpretation of the Constitution.[97]

Even looking at the Ninth Amendment with an intratextual eye, however, does not advance us far in the search for unenumerated rights. The only phrase found in the Ninth Amendment that reappears in other sections of the Constitution is "the people," and the most that can be said about rights by this phrase is that they should be considered to be rights of the citizens of the state rather than rights which the state itself may have against the Federal Government.[98]

However, the Ninth Amendment is not the only place in which Amar would look for unenumerated rights. Rather, he argues that an intratextual interpretation of the Fourteenth

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[94] *See* BOBBITT, FATE, *supra* note 10, at 26.

[95] *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999). Although Amar most closely identifies this practice with textualism, he also argues that it is distinct from all of the conventional modalities in important ways. *Id.* at 788-90. He contends that it is also somewhat akin to structural argument, but concludes that, in the end "it may not matter how we formally classify it." *Id.* at 791.

[96] *Id.* at 748.

[97] *Id.* at 788-89. Amar is a strong proponent of a holistic interpretation of constitutional provisions. *Id.* at 797-98. As a result, he applauds Justice Douglas's "penumbra" opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965), for attempting to offer a view which combines different clauses. *Id.* However, Amar is critical of the reasoning behind *Griswold*, with which he does not agree. *Id.* at 797.

[98] *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 120-23, 180 (1999). Amar argues that the Ninth Amendment should be read in conjunction with the Tenth Amendment as a statement that "the people," having formed the government, reserve the right to alter or abolish it. *Id.* at 123.

Amendment's Privileges or Immunities Clause points the way to recognition of some unenumerated rights.[99] According to Amar, the phrase "privileges or immunities of citizens of the United States" in the Fourteenth Amendment should receive the same construction as the phrase "Privileges and Immunities of Citizens in the several States," which is found in Article IV's Interstate Privileges and Immunities Clause.[100] Amar then argues that, at the time of the Fourteenth Amendment, this part of the Privileges and Immunities Clause was interpreted to include the common-law rights, as suggested by the Circuit Court for the Eastern District of Pennsylvania in what Amar terms the "leading" case, *Corfield v. Coryell*.[101] In that case, the court declared that the privileges and immunities of the citizens in the several states under Article IV's Clause included "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign."[102]

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[99] *Id.* at 176-78.

[100] *Id.* The Interstate Privileges and Immunities Clause provides in pertinent part that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

[101] Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). AMAR, THE BILL OF RIGHTS, *supra* note 93, at 176-78.

[102] *Corfield*, 6 F. Cas. at 551. According to the Court in *Corfield*, examples of these rights included:

> Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state . . . .

Id. at 551-52.

Even if this questionable intratextual link between the Privileges or Immunities Clause and the Interstate Privileges and Immunities Clause can be credited, however, the rights which Amar argues for cannot be found on the basis of the text alone, but rather must be discerned through doctrinal and historical means. As with strict textualism, intratextualism alone cannot supply the kind of rights that might be included among the "rights retained by the people."

In our search for Ninth Amendment rights, then, the textual modality does not ultimately yield any content. While its application may result in the conclusion that unenumerated rights are protected by the Constitution, it cannot take us any farther.

IV. DOCTRINAL ARGUMENT

According to Bobbitt, a doctrinal argument is an argument that "asserts principles derived from precedent or from judicial and academic commentary on precedent."[103] Rather than depending on how the drafter of the Constitution actually intended a specific passage to be applied, doctrinal argument seeks to fashion and apply "neutral rules of general applicability" which serve or can be assumed to serve general purposes sought by the drafters.[104] The precedent relied upon need not be exclusively case law; rather, the practices of other governing institutions such as Congress or the President may also be used.[105] Further, the test need not come directly as the result of *stare decisis*, for "in the American system one of the principles of doctrinalism is that the Supreme Court may reverse the relevant precedent" and instead adopt alternative rules.[106]

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[103] BOBBITT, FATE, *supra* note 10, at 7.

[104] *Id.* at 57. *See* BOBBITT, INTERPRETATION, *supra* note 10, at 55.

[105] BOBBITT, FATE, *supra* note 10, at 18. For instance, the Court has stated that, "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned" could serve as a "gloss" on the executive power granted by the Constitution. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring); *see also* Dames & Moore v. Regan, 453 U.S. 654, 686 (1981).

[106] BOBBITT, INTERPRETATION, *supra* note 10, at 20.

Applying the doctrinal modality to the Ninth Amendment might at first glance seem to present a problem, given the paucity of the Court's Ninth Amendment jurisprudence.[107] The Supreme Court's consideration of the Ninth Amendment has been fairly cursory, with little attempt to answer the question of whether the Ninth Amendment authorizes the protection of unenumerated rights, and almost no thought to what those rights might be. The most noteworthy of these decisions, *Griswold v. Connecticut*, is more influential for its concurring, rather than majority, opinion.[108] However, the Court's Ninth

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[107] *See* MASSEY, SILENT RIGHTS, *supra* note 15, at 15 (stating that "[t]here is an absence of doctrinal argument [on the Ninth Amendment] because there is no doctrine.").

[108] *See* Griswold v. Connecticut, 381 U.S. 479 (1965). Prior to *Griswold*, the Supreme Court had only substantively engaged in a discussion on the Ninth Amendment once, in United Public Workers of Am. v. Mitchell, 330 U.S. 75 (1947); Niles, *supra* note 1, at 89 n.12 (detailing the pre-*Griswold* Ninth Amendment jurisprudence). In *Mitchell*, the question was whether the Hatch Act, which prohibited certain political activities by federal employees, was a violation of the First, Fifth, Ninth, and Tenth Amendments. *Mitchell*, 330 U.S. at 81-82. One of the claims was that the Act violated the fundamental right to political activity retained by the Ninth and Tenth Amendments. *Id.* at 83. In upholding the Act, the Court articulated an odd "rights-power" position, stating:

> [W]hen objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.

Id. at 96. The only other majority opinions prior to *Griswold* which encompassed the Ninth Amendment summarily rejected its application to the concerned rights in question. Niles, *supra* note 1, at 89 n.12. *See* United States v. Orito, 413 U.S. 139, 143 (1973) (rejecting the extension of privacy to placing obscene films in interstate commerce); Tenn. Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118, 143-44 (1939) (rejecting idea that federal effort to create dams violated Ninth Amendment right to acquire property and employ it in a lawful business).

Since its opinion in *Griswold*, the Court has mentioned the Ninth Amendment in a majority opinion only twice, in Roe v. Wade, 410 U.S. 113, 153 (1972) and Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579-80 (1980). In *Roe*, the Court cited Justice Goldberg's concurring opinion in *Griswold* for the proposition that individual justices had found the right to privacy to have roots in the Ninth Amendment, and stated that:

> This right of privacy, whether it be founded in the Fourteenth

Amendment jurisprudence is not the only place in which we may look for doctrinal rules concerning unenumerated rights.

While the Court's Ninth Amendment jurisprudence relating to unenumerated rights is almost nonexistent, this does not mean that the Court has not recognized the existence of unenumerated rights in the Constitution. Rather, the Court has recognized some unenumerated rights as fundamental under the rubrics of substantive due process, equal protection, and the Privileges or Immunities Clause.[109] It is true that the

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> Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Roe, 410 U.S. at 153. In *Richmond Newspapers*, the Court incidentally cited the Ninth Amendment as part of its conclusion that certain unarticulated rights, such as the right to attend criminal trials, are implicit in enumerated rights. *Richmond Newspapers*, 448 U.S. at 579 n.15. The only other mention of the Ninth Amendment has been in passing in certain concurrences and dissents. *See* Troxel v. Granville, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting) (stating that although the right of parents to direct the upbringing of their children is one of the retained rights under the Ninth Amendment, this does not empower judges to enforce it); Alden v. Maine, 527 U.S. 706, 763 (1999) (Souter, J., dissenting) (noting in passing that there is no reason to suppose that the Ninth Amendment constitutionalized all common-law individual rights); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 994 (1992) (Scalia, J., dissenting) (rejecting the premise that the Ninth Amendment was a "charter for action" rather than a "disclaimer"); Hodgson v. Minnesota, 497 U.S. 417, 447-48 (1990) (Stevens, J., concurring).

[109] *See* WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 1238-41 (3d ed. 2003). The following cases are examples of unenumerated rights recognized by the Court. *See* Saenz v. Roe, 526 U.S. 489 (1999) (stating that the right to travel within the United States exists); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990) (recognizing the right to refuse medical treatment); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (acknowledging the right to attend and report on criminal trials); Zablocki v. Redhail, 434 U.S. 374 (1978) (acknowledging the right to make decisions about having children); In re Winship, 397 U.S. 358 (1970) (recognizing the right to enjoy a presumption of innocence and demand proof beyond a reasonable doubt before conviction of a crime); Loving v. Virginia, 388 U.S. 1 (1967) (acknowledging the right to marry); Afroyim v. Rusk, 387 U.S. 253 (1967) (acknowledging the right to retain American citizenship until explicitly and voluntarily renouncing it); Griswold v. Connecticut, 381 U.S. 479 (1965) (stating that the right to privacy exists); Reynolds v. Sims, 377 U.S. 533 (1964) (recognizing the right to vote, subject only to reasonable restrictions to prevent fraud); NAACP v. Button, 371 U.S. 415 (1963) (recognizing

substantive due process decisions actually interpret the phrase "liberty" from the Due Process Clause.[110] However, these "liberties" protected by the Due Process Clause are not new rights, but rather the rights that the American people have always possessed, "barring certain government actions regardless of the fairness of the procedures used to implement them . . . ."[111] Thus, there is a significant overlap between the rights protected by substantive due process and the rights "retained by the people" under an unenumerated rights-based view of the Ninth Amendment. As a result, we can also use the doctrine developed by the Court for these other decisions concerning unenumerated rights as examples of doctrinal rules that might be applied to the Ninth Amendment.

We begin our search for such doctrinal rules with the most famous case to mention the Ninth Amendment, *Griswold v. Connecticut*.[112] In *Griswold*, the question was whether Connecticut's laws prohibiting the use or aiding and abetting of the use of contraceptive devices were constitutional as applied to the use of contraceptives by married couples.[113] Writing for the majority, Justice Douglas stated only that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees," and that various guarantees, specifically those in the First, Third, Fourth, Fifth, and Ninth

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the right to the use of a federal court's process and to encourage others to do so); Bolling v. Sharpe, 347 U.S. 497 (1942) (recognizing the right to receive equal protection from both the state and federal government); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (recognizing the right to educate children so long as minimum state standards are met); Meyer v. Nebraska, 262 U.S. 390 (1923) (recognizing the right to choose and follow a profession). In some cases, the concept of substantive due process becomes intertwined with the Ninth Amendment in the Court's discussion. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that the right to privacy is grounded in substantive due process rather than the Ninth Amendment); *Griswold*, 381 U.S. at 492-93 (Goldberg, J., concurring) (using the Ninth Amendment to provide support for substantive due process protection of unenumerated rights).

[110] *See* U.S. CONST. art. XIV, § 1.

[111] *See* Daniels v. Williams, 474 U.S. 327, 331 (1986).

[112] *Griswold*, 381 U.S. at 479.

[113] *Id.* at 480-81.

Amendments, create "zones of privacy."[114] Douglas stated that the right to use contraception fell within a "zone of privacy created by several fundamental constitutional guarantees," in light of which the Connecticut statutes could not stand.[115] However, aside from his mention of the Ninth Amendment as one of these possible places, Douglas made no further attempt to analyze the Ninth Amendment.

Justice Douglas's opinion does make it clear that he believes that enumerated rights exist.[116] Unfortunately, as a doctrinal test, his idea of penumbras is unusable. Although Justice Douglas' statement that certain specific guarantees in the Constitution have penumbras emanating from them may possibly suffice to justify, however unsatisfactorily, his pronouncement of a right of privacy, it provides no rule capable of general application.[117] Further, it is couched in terms too vague to provide any basis from which such a rule might be derived. There is very little in the opinion which would allow a judge faced with the question of whether a specific right is worthy of constitutional protection to determine whether the right falls within the emanating penumbras of enumerated rights, because the connection of the right of privacy to these zones is never adequately explained. Therefore, it is very difficult to support an argument that any right in question is analogous to the right of privacy as Douglas determined it.

Justice Goldberg's concurring opinion in *Griswold*, however, does offer a doctrinal test.[118] In this opinion, Justice Goldberg stated his belief that there existed fundamental personal rights, including the right to marital privacy, outside of those enumerated in the Bill of Rights.[119] In support of this contention, he cited the Ninth Amendment, stating that, "[t]he language and history of the Ninth Amendment reveal that the

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[114] *Id.* at 484.

[115] *Id.* at 485-86.

[116] *Id.* at 484.

[117] *See id.*

[118] *Id.* at 486-500 (Goldberg, J., concurring).

[119] *Id.* at 486-87.

Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."[120] Justice Goldberg opined that a decision which failed to acknowledge the fundamental right of marital privacy simply because it was not expressly enumerated in the first eight amendments would violate the Ninth Amendment.[121]

Although Justice Goldberg denied that the Ninth Amendment itself contained unenumerated rights, he argued that the Ninth Amendment supported the Court's view that the "liberty" protected by the Fifth and Fourteenth Amendments protected rights beyond those enumerated in the first eight amendments.[122] He then stated that "[i]n determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.'"[123] According to Justice Goldberg, "[t]he inquiry is whether a right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . ."[124] He further stated that "'[l]iberty' also 'gains content from the emanations of . . . specific [constitutional] guarantees' and 'from experience with the requirements of a free society.'"[125]

Under Justice Goldberg's doctrinal test, therefore, an unenumerated right would be worthy of constitutional protection if it either: (1) is "so rooted" in the "traditions and [collective] conscience" of the American people that it cannot be denied without violating the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"; (2) emanates from a specific constitutional guarantee; or (3) is necessary to the "requirements of a free society."[126] This rule is doctrinal, in that it is neutral to the parties involved and can be generally applied to all cases where a purported unenumerated right is asserted as fundamental.[127] As noted above, it does not matter that the test is developed in a concurring opinion, and is therefore not precedent.[128]

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[120] *Id.* at 488.

[121] *Id.* at 490-91.

[122] *Id.* at 493.

[123] *Id.* (alterations in original) (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

[124] *Id.* (internal quotation marks omitted) (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932)).

[125] *Id.* at 493-94 (alteration in original) (quoting Poe v. Ullman, 367 U.S. 497, 517 (1961)).

Justice Harlan also set forth a test for rights in his concurring opinion in *Griswold*.[129] In Justice Harlan's opinion, the Fourteenth Amendment's Due Process Clause protects those rights that are "'implicit in the concept of ordered liberty.'"[130] While Harlan thought that this inquiry might be aided by the provisions of the Bill of Rights, it is not dependent on those rights or their "radiations."[131] As reasoning for this conclusion, he cited his dissenting opinion in *Poe v. Ullman*, wherein he stated that:

> Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no "mechanical yard-stick," no "mechanical answer." The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take "its place in relation to what went before and further [cut] a channel for what is to come."[132]

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[126] *See id.* (alteration in original) (internal citations omitted).

[127] *See* BOBBITT, INTERPRETATION, *supra* note 10, at 20.

[128] *See id.*; *see also supra* note 101 and accompanying text (noting that the doctrinal modality is not confined to the application of *stare decisis*).

[129] *Griswold*, 381 U.S. at 499 (Harlan, J., concurring).

[130] *Id.* at 500 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[131] *Id.*

[132] Poe v. Ullman, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting) (alteration in original) (quoting Irvine v. California, 347 U.S. 128, 147 (1965) (Frankfurter,

Thus, Justice Harlan's rule would require the judge to determine whether the right involved is "implicit in the concept of ordered liberty," taking into account the way in which the purposes of the Constitution have been developed.

Another possible test for unenumerated rights comes from Justice Powell's plurality opinion in *Moore v. City of East Cleveland*.[133] In that case, speaking of the substantive reach of the Due Process Clause, Justice Powell stated that: "[a]ppropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teaching of history [and] solid recognition of the basic values that underlie our society.'"[134] The test he would set forth in determining the protection of unenumerated rights is whether those rights are "deeply rooted in this Nation's history and tradition."[135]

The above-cited doctrinal tests all have a number of qualities in common. First, in their tests for fundamental rights, they all attempt to define these rights by tapping into the basic foundations of the spirit of the American people and the Constitution.[136] Second, their proponents all argue that the use of these doctrinal tests will constrain judges, so that only rights which are in fact fundamental will be protected, and other rights will not be invented according to judges'

J., dissenting)).

[133] 431 U.S. 494, 503 (1977) (plurality opinion).

[134] *Id.* at 503 (second alteration in original) (citing Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).

[135] *Id.* Justice Powell believed that grounding this approach in history as he had done would impose limits on the judiciary that would be more meaningful than "the abstract formula" of rights "implicit in the concept of ordered liberty" enunciated in *Palko v. Connecticut*. *Id.* at 503-04 n.12.

[136] *See Moore*, 431 U.S. at 503 (plurality opinion) (speaking of rights "deeply rooted in this Nation's history and tradition"); Griswold v. Connecticut, 381 U.S. 479, 493-94 (1965) (Goldberg, J., concurring) (speaking of the "traditions and [collective] conscience" of the American people and "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (internal citations omitted)); *id.* at 500 (Harlan, J., concurring) (speaking of rights "implicit in the concepts of ordered liberty" (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937))).

whims.[137] Finally, in spite of these protestations, the tests set out standards which are not in fact constraining, and are susceptible to a large degree of individual judicial discretion.[138]

The glimmerings of a stricter doctrinal test can be discerned in *Richmond Newspapers, Inc. v. Virginia*. In that case, the Court incidentally cited the Ninth Amendment as part of its conclusion that certain unarticulated rights, such as the right to attend criminal trials, are implicit in enumerated rights.[139] The Court spoke of these rights as being those "indispensable to the enjoyment of rights explicitly defined."[140]

Justice Scalia has also attempted to enunciate a somewhat more restrictive approach. In his opinion in the case of *Michael H. v. Gerald D.*,[141] he stated that, in determining whether a right is to be protected by substantive due process, "we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society."[142] Further, according to Scalia, in determining whether the right is one which is traditionally protected, the Court's inquiry should be "to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[143]

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[137] *See Moore*, 431 U.S. at 503-04 n.12 (plurality opinion) (stating that the offered approach, being "grounded in history imposes limits on the judiciary that are more meaningful than any based on the abstract formula" of rights "implicit in the concepts of ordered liberty"); *Griswold*, 381 U.S. at 494 n.7 (Goldberg, J., concurring) (stating that, under the test he proposes "it cannot be said that a judge's responsibility to determine whether a right is basic and fundamental in this sense vests him with unrestricted personal discretion"); *id.* at 501-02 (Harlan, J., concurring) (stating that his approach is no more likely to result in "'personal interpretations'" by judges than any others).

[138] This does not mean that the tests are somehow less valid because they allow personal discretion. It is, however, an important characteristic to understand in realizing the possibilities and limitations that these tests provide.

[139] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579-80 (1980) (plurality opinion).

[140] *Id.* at 580.

[141] 491 U.S. 110 (1989) (plurality opinion).

[142] *Id.* at 122 (Scalia, J.).

[143] *Id.* at 127-28 n.6. In asserting this specific limitation, Justice Scalia was

The doctrinal tests of the Court's opinion in *Richmond Newspapers* and Scalia's opinion in *Michael H.* each attempt to place limitations on what asserted rights qualify as fundamental, in order to prevent judges from exercising unbridled discretion. *Richmond Newspapers* would limit unenumerated rights by requiring a connection between them and enumerated rights: only those unenumerated rights which are implicit in the guarantees of enumerated rights will be protected. Even here, the doctrinal test is quite expansive, as the test does not attempt to define when an unenumerated right is implicit in an enumerated right. The unenumerated right in question in *Richmond Newspapers* was the right to attend criminal trials, which the Court held was indispensable to the freedom of speech and of the press under the First Amendment.[144] While the connection between these rights exists, it is not self-evident. A stronger connection could be made by saying that the right of a newspaper to attend criminal trials is necessary to ensure that the trial will be fair, and thus is implicit in the Sixth Amendment's guarantee of a public trial by an impartial jury.[145] Under this expansive doctrinal test, a wide-range of rights might be implicit in enumerated rights.

Justice Scalia's proposed test also seems to have a limiting effect on rights, especially with his qualification that the asserted right not only be one that has traditionally been protected, but also must be judged at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[146] However, even this limitation may be illusory. Professors Laurence Tribe and Michael Dorf have argued that Scalia's purported limitation is ultimately unworkable, because the effort to use tradition is not value neutral and there is no level of specificity to which judges can

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joined only by Chief Justice Rehnquist. Justices O'Connor and Kennedy, who had joined in the main text of this part of the opinion, refused to join in the footnote. *See id.* at 112.

[144] *Richmond Newspapers, Inc.*, 448 U.S. at 580 (plurality opinion).

[145] *See* U.S. CONST. amend. VI.

[146] *See Michael H.*, 491 U.S. at 127-28 n.6 (plurality opinion) (Scalia, J.).

consistently rely.[147] Thus, according to Tribe and Dorf, this allows the test to "be deployed selectively, allowing judges to define rights more or less abstractly," depending on their whims.[148]

It might be argued that Justice Souter has established a doctrinal test for unenumerated rights in his concurring opinion in *Washington v. Glucksberg*.[149] Under Justice Souter's formulation, the judge's duty is first to look at the purported unenumerated right involved and determine whether it is "exemplified by 'the traditions from which [the Nation] developed,' or revealed by contrast with 'the traditions from which it broke.'"[150] However, the establishment of the right does not end there, for the purported right must then be balanced with the competing governmental interests, and "[i]t is only when the legislation's justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that . . . the individual claimant [can] be said to have a constitutional right."[151] Under Justice Souter's formulation, then, rights may still be interpreted in an expansive manner, using the broad concept of national traditions. Souter would argue that this expansive approach to unenumerated rights is constrained by the need to balance the purported right against the competing governmental interests. However, this is ultimately what happens in all cases of rights; that is, no right is absolute as against any governmental interference. In characterizing a purported right as a fundamental right only after it is balanced, Souter is actually simply changing its characterization, without changing the nature of the right.[152]

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[147] LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 98-109 (1991).

[148] *Id.* at 109. *See generally* J. Richard Broughton, *The Jurisprudence of Tradition and Justice Scalia's Unwritten Constitution*, 103 W.VA. L. REV. 19 (2000); A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409 (1999) (discussing Scalia's traditional doctrinal test).

[149] 521 U.S. 702 (1997).

[150] *Id.* at 767 (Souter, J., concurring) (alteration in original) (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

[151] *Id.* at 768 (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990)).

These are the prime examples of doctrinal tests developed from the United States Supreme Court's jurisprudence that could be used to determine what rights should be entitled to fundamental protection under the Ninth Amendment. To a large extent, and despite the best protestations of their proponents, they provide a broad range of possible rights that could be enforced depending upon a particular judge's concept of whether a certain right is "implicit in ordered society" or "deeply rooted" in the traditions of America. Nonetheless, they provide valid guidance from which the Ninth Amendment can be implemented by courts.

V. PRUDENTIAL ARGUMENT

As formulated by Bobbitt, prudential argument is argument that "is actuated by the political and economical circumstances" surrounding the decision.[153] Rather than mandating a specific result, prudential argument seeks to balance the necessity of taking an action against its costs.[154] Thus, under the prudential modality, the Court should balance the reasons for protecting a purported unenumerated right with the costs associated in doing so, including such factors as the difficulties lower courts will have in applying the protection, the problems that the recognition of the right may cause in the orderly administration of justice, the public support the right is liable to receive, and the Court's own judicial role and limited political capital. While there may be some instances in which the Court may recognize certain rights as fundamental no matter what the cost, there will surely be other occasions where the prudential course of action would be to avoid giving certain rights such status.[155]

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[152] It appears that Souter realizes his doctrinal test is not really constraining and relies on the judgment of the interpreter. In *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion), Souter, along with Justices Kennedy and O'Connor, authored the opinion of the Court, which questioned whether there could be a true doctrinal test for unenumerated rights under the Due Process Clause. The opinion stated that "[t]he inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule." *Id.* at 849.

[153] BOBBITT, FATE, *supra* note 10, at 61.

[154] *See id.*

Given the nature of the prudential modality, it is not possible to determine with specificity what kind of "package" of rights a prudential approach will give. The recognition of each possible right depends on the balance unique to its recognition, as well as the political and social environment prevailing at the time that it is asserted. However, it is possible to offer some general observations about the kinds of rights that would most likely be recognized by a court operating in a prudential mode.

First, such a court is more likely to recognize negative rights that constrain the government than positive rights which affirmatively require the government to act. Although some scholars are hopeful that judicial recognition of unenumerated rights will open up a new fount of positive rights that the courts would enforce, such as the right to an education,[156] or the right to "a decent material basis for life,"[157] the associated political cost to the Court in recognizing such rights would likely be prohibitive. It is much more palatable in today's society if unenumerated rights are seen as limits on the government's implied power. Further, this characterization seems to better fit the view of the Ninth Amendment as a protection for personal liberties and the Ninth Amendment's text, which speaks of rights "retained by the people."[158]

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[155] *See* David Crump, *How Do the Courts* Really *Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL'Y 795, 898-99 (1996). Crump believes that asking the question of why the right should not be considered fundamental is as important as asking why it should, because categorizing an interest as important says nothing about the consequences to legislative and judicial roles that will result if the right is labeled fundamental. He argues that the Court could have avoided the problems associated with its decision in *Lochner v. New York*, 198 U.S. 45 (1905), if it had considered the negative effects of its decision as well as the positive ones. *Id.* at 906-08. According to Crump, the fault of *Lochner* was that:

> [T]he Court considered only the positive arguments for recognizing an elevated liberty interest in the freedom to contract, and it did not evaluate the negative consequences of hamstringing legislatures by labeling this interest as a fundamental right. It also did not give proper weight to the limits of the judicial role, or the degree to which the Court would distort that role if it arrogated to itself the Herculean task of supervising by heightened scrutiny every single intervention in a relatively unregulated market that might be appropriate to promote safety, welfare, quality, or accuracy.

Id. at 907 (footnote citation omitted).

[156] *See generally* Susan H. Bitensky, *Theoretical Foundations For a Right to Education Under the U.S. Constitution: A Beginning to the End of the National*

Second, it seems more likely that a prudential Court would favor unenumerated rights that can be tied to specific textual guarantees and have a historical basis, rather than rights which are free-floating and of more recent vintage. Calvin Massey argues that, in recognizing unenumerated rights as fundamental, some prudential limits should be required:

> [1] an asserted fundamental right should have textual foundation in the Constitution, however implicit or attenuated . . . .; [2] [the right] should have some historical authenticity in the organic law of the nation, the states, the colonies, or the common law; (3) the right should be consistent with the theoretical construct of natural rights . . . .; [and] [4] it should be a right generally recognized by a significant portion of contemporary society as one inextricably connected with the inherent dignity of the individual.[159]

Third, a prudential Court is more likely to recognize a fundamental right or an extension of a fundamental right backed by broad public support than an alleged right that only has limited support or is antithetical to a large group of people. An example of this concept can be seen in the Court's jurispru-

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Education Crisis, 86 NW. U. L. REV. 550 (1992).

[157] *See* Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1105 (1986).

[158] *See* PATTERSON, *supra* note 9, at 58 (arguing that the Ninth Amendment's "great declaration of individual liberty" might be distorted by socialist claims of rights to food, housing, and medicine, which would take the Ninth Amendment out of its natural setting).

[159] Massey, *Federalism and Fundamental Rights*, *supra* note 8, at 330-31 (1987). Massey believes in looking for sources of unenumerated rights in the positive rights created by state constitutions, as well as natural rights. *Id.* at 344.

dence with regard to the right of privacy. In *Griswold*, the Court found that the constitutional right of privacy protected the right of a married couple to use contraception.[160] In *Eisenstadt v. Baird*,[161] the Court extended that same protection to unmarried couples, noting that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[162] However, in *Bowers v. Hardwick*,[163] the Court refused to extend the right to privacy to encompass the right of homosexual couples to engage in consensual sodomy.[164] Although the Court read the right to privacy expansively in the first two cases, the controversial nature of the activity in *Bowers* led to a limitation of further expansion.

Of course, the current Court has now gone beyond that limitation, overruling the *Bowers* decision in *Lawrence v. Texas*,[165] and holding that the "right to liberty under the Due Process Clause gives [adult, consenting homosexual persons] the full right to engage in their conduct without intervention of the government."[166] The Court advanced several rationales for this extension of rights, including the "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex,"[167] *Bowers'* purported misreading of history and prior authority,[168] subsequent precedent,[169] and criticism of the *Bowers* decision from legal sources that cast doubt on the holding.[170] However, it is not beside the point to note that the Court overruled *Bowers* and extended the right when it was prudent to do so, and not before.[171] Further, it is interesting to note that, in characterizing the right at issue, the Court used the more general term "right to liberty" rather than the "right to privacy" in *Bowers*, a right that would surely have been more controversial after *Roe v. Wade*.[172]

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[160] Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

[161] 405 U.S. 438 (1972).

[162] *Id.* at 453.

[163] 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[164] *Id.* at 194-96. The Court stated that "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." *Id.* at 197 (Burger, C.J., concurring).

[165] 539 U.S. 558 (2003).

[166] *Lawrence*, 539 U.S. at 578.

[167] *Id.* at 572.

[168] *Id.* at 572-73.

[169] *Id.* at 573-76 (citing Romer v. Evans, 517 U.S. 620 (1996); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

Thus, unenumerated rights under the prudential modality will be arrived at through the use of judicial reason, after balancing the positive and negative arguments that either urge or militate against its recognition. The great strength of this modality is that the rights involved will tend to be those which have firm textual and historical roots, enjoy broad public support, and are uncontroversial. The greatest weakness is that these are the rights that least need constitutional protection, as they are likely to be well protected by the democratic process.

VI. STRUCTURAL ARGUMENT

Bobbitt defines structural argument as an argument form based on "claims that a particular principle or practical result is implicit in the structures of government and the relationships that are created by the Constitution among citizens and government."[173] According to Bobbitt, structural arguments usually follow this format: "first, an uncontroversial statement about constitutional structure is introduced . . .; second, a relationship is inferred from this structure . . .; third, a factual assertion about the world is made . . .; [f]inally], a conclusion is drawn that provides the rule in the case."[174]

With regard to the identification of unenumerated rights, one way in which the structural modality could work involves inferring unenumerated rights from the structure created by the enumerated rights in the Bill of Rights. This sort of reasoning is best illustrated in the constitutional theories of Norman Redlich, Stephen Macedo, and Charles Black, Jr.[175]

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[170] *Id.* at 576-77.

[171] Of course, given the amount of controversy engendered by the decision, it appears that not everyone agrees that the Court's decision in *Lawrence* was the "prudent" thing to do.

[172] *See Lawrence*, 539 U.S. at 578; *see also* Roe v. Wade, 410 U.S. 113 (1971).

[173] BOBBITT, FATE, *supra* note 10, at 7.

[174] BOBBITT, INTERPRETATION, *supra* note 10, at 16.

According to Norman Redlich, "[t]he original Constitution and its amendments project through the ages the image of a free and open society."[176] He argues that the rights "retained" by the people were not enumerated simply because it was felt that a full enumeration was impossible, not because they were different in character than the rights that were enumerated. Therefore, the Ninth Amendment "should be used to define rights adjacent to, or analogous to, the pattern of rights which we find in the Constitution."[177] As an example of how this approach would work, Redlich puts forth the right to marital privacy, which he felt could be inferred from the pattern created by the Constitution's Fourth Amendment prohibition on unreasonable searches and seizures.[178]

Similarly, Stephen Macedo contends that one way in which the Ninth Amendment can be given substance is by "consulting values underlying the more specific acknowledgments of constitutional rights."[179] He contends that this process is similar to the one used by Chief Justice John Marshall in his opinion in *McCulloch v. Maryland*,[180] wherein Marshall reasoned that interpreters should look not only at the specific grants of power but also "at the ends and purposes implicit in the powers that are specifically granted."[181]

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[175] *See* Charles L. Black, Jr., *On Reading and Using the Ninth Amendment*, *in* POWER AND POLICY IN QUEST OF LAW: ESSAYS IN HONOR OF EUGENE ROSTOW 187 (M. McDougal & W.N. Reisman eds., 1985), *reprinted in* 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 337 (Randy E. Barnett ed., 1989); Macedo, *supra* note 9; Redlich, *supra* note 8.

[176] Redlich, *supra* note 8, at 144.

[177] *Id.* at 146-47.

[178] *Id.* at 145. Redlich also argues that the result in *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867), in which the Court struck down a tax on every person leaving the state on the structural basis that persons must have unfettered access to the seat of the national government wherever it was located, could also be justified by reasoning that since states are forbidden to tax imports or exports by the Constitution, an individual should have also have the right to reach a seaport to carry on such business. *Id.* at 145-46.

[179] Macedo, *supra* note 9, at 153-54.

[180] 17 U.S. (4 Wheat.) 316 (1819).

Structural considerations also play a large part in the theory of unenumerated rights articulated by Charles L. Black, Jr.[182] Black would find rights by arguing from analogy to specific enumerated rights, as well as from the structural concept of the Constitution as a whole.[183] He contends that this type of reasoning is similar to that which spawned the right of freedom of association from the general concept of freedom of speech.[184]

All of the aforementioned arguments utilize a formula which is similar to what Bobbitt described as the classic structural method.[185] First, there is the uncontroversial assertion about the structure of the Constitution, i.e. that it contains both powers of the national government and rights which limit those powers. Second, there is the identification of a relationship between the enumerated rights named and the rights "retained by the people" under the Ninth Amendment. It is then argued that the Framers would have intended the rights retained by the people to be similar in form to those which they specifically enumerated, and to advance the theory of the Constitution in the same way as the enumerated rights, which leads to the rule that unenumerated rights may be inferred from the rights which have been enumerated and the purposes to be served by the Constitution.

These theories, as with structural theories in general, do not pretend to provide specific closed bundles of rights which are retained. Rather, they provide a method by which such bundles may be ascertained on a case-by-case basis. One major complaint may be that such process is open-ended, and subject to a large quantity of judicial reasoning in its application. However, a partial answer to this complaint is the reasoning is at least of a type that judges are familiar with, and which is used in many forms of constitutional adjudication. Further, the results are at least quantifiable, and can be judged as to how well they fit within the constitutional framework.

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[181] Macedo, *supra* note 9, at 154. Macedo also contends that this was the process that Justice Douglas was attempting to follow in *Griswold*, but was unable to articulate well, in *Griswold*. *Id.* at 153.

[182] Black, *supra* note 175, at 342-44. Black believes that the structural method is not the only one that should be used to identify unenumerated rights, but rather that the Constitution requires us to use all methods of legal reasoning at our disposal to "do our best to discover for ourselves what unenumerated rights are to be given sanction." *Id.* at 342.

[183] *Id.* at 342-44.

[184] *Id.*

[185] *See generally* BOBBIT, FATE, *supra* note 10, at 74-92.

VII. ETHICAL ARGUMENT

We come now to the last modality articulated by Bobbitt: ethical argument.[186] Bobbitt defines this form as "argument whose force relies on a characterization of American institutions and the role within them of the American people."[187] Like the proceeding iterations of structural argument, ethical argument standing alone cannot provide us with a certain set of rights. However, the use of ethical argument can result in ways in which unenumerated rights might be identified and applied.

The ethical approach can be seen in the theory of unenumerated rights proposed by Simeon McIntosh.[188] McIntosh argues for a "holistic" interpretation of the Constitution, which would take into account "the nature and character of the constitutional text," and "the concept of justice embodied in the Constitution as developed by subsequent amendments," and which "elucidates . . . the political theory that can be said to justify the Constitution as a whole, thereby capturing the relationship between that set of abstract rights that the Constitution can be said to have legislated and the concrete rights thought to be required . . . ."[189] He would require anyone asserting or denying such rights to phrase their arguments in terms of why the conception of the Constitution requires that result.[190]

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[186] BOBBITT, FATE *supra* note 10, at 94.

[187] *Id.*

[188] McIntosh, *supra* note 8, at 233-40.

[189] *Id.* at 234-35.

Charles R. Black, Jr. also incorporates ethical argument, along with others, in his theory of the Ninth Amendment. He argues that, in identifying unenumerated rights, we look to those rights which may be drawn from "the noblest of the concepts to which our nation is committed."[191] He would look for those concepts in sources such as the Declaration of Independence and the Preamble to the Constitution, drawing from them concepts such as "liberty," "proportionality," "justice," and the "pursuit of happiness" with which to test rights.[192]

Calvin Massey advances another sort of ethical argument, one which obliges courts to effectuate what he feels is the dominant ethos of the Constitution: a government of limited powers.[193] Massey's argument takes the Federalists' assertions regarding the Constitution at their word, stating that the original purpose of the Ninth Amendment was to validate the Constitution's commitment to limited government by denying the government power.[194] This, according to Massey, was consistent with the Framers view that rights were passive, inherent in the lack of governmental power to invade them.[195] However, we no longer regard rights in that manner, instead looking at rights as a means to constrain expansive federal and state power. Therefore, a passive Ninth Amendment can no longer perform the function to which it was made, and we must resort to what Massey terms a constitutional "cy pres" doctrine.[196] Using this doctrine, we reform the meaning of the Ninth Amendment to better articulate the expressed ethos of the Constitution.[197] Where the Ninth Amendment might previously have been passive, the purpose of the Constitution requires that it be construed as an expansive source of rights in order to confine the government to its original form of limited powers.[198]

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[190] *Id.* at 240-41.

[191] Black, *supra* note 175, at 344.

[192] *Id.* at 346-47.

[193] *See generally* MASSEY, SILENT RIGHTS, *supra* note 15 (1995).

[194] *See id.* at 98.

[195] *Id.*

[196] *Id.* at 97-101.

[197] *Id.*

These ethical arguments seek to promote the idea of an ethos of the Constitution. Rather than identifying a bundle of rights which might be encompassed in the Ninth Amendment, they instead provide ways in which we might identify asserted rights by looking at the values which the Constitution as a whole was designed to advance. They are necessarily open-ended, and provide a large amount of discretion. Whether this is their strength or weakness depends upon the sensibilities of the observer.

VIII. CONCLUSION

And so, these are the ways in which we might think of identifying and applying the "rights retained by the people" under the Ninth Amendment, rendered down to their essence using the modalities of constitutional argument. As I have attempted to show, each different modality presents different ways of understanding the nature of unenumerated rights, and each modality has its strengths and weaknesses. While the textual modality guards against the prospect of judges creating additional constitutional rights of their own choosing, it does so at the expense of ignoring completely the text of the Ninth Amendment itself. The "state law" formulation of the historical modality, on the other hand, provides a definite set of rights that might indeed be a correct formulation of the Framer's intent for the Ninth Amendment. However, the result of this formulation is that the Ninth Amendment becomes simply a secondary enumeration of rights to complement those already enumerated, frozen in the time of the Framing. Meanwhile, other modalities offer ways of determining unenumerated rights that appear to imbue judges with almost unlimited discretion to make up rights at will.

Even reduced to the level of the modalities, there is no determinative set of rights that may be discerned from the

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[198] *Id.* at 98-99.

Ninth Amendment. Many modalities offer the prospect of more than one interpretation of unenumerated rights, with differing level of discretion awarded to judges. Thus, for example, a strict practitioner of the historical modality must still choose which package of rights best represents his or her conception of the Framers' and Ratifiers' intent.

In any event, it is highly unlikely that any decision which ultimately results in the application of the Ninth Amendment will be based exclusively on one specific argument form. While judges may have their preferred method of argument, very few are strict historical originalists or strict textualists. If nothing else, the perceived need to fit decisions within the doctrinal framework already existing will tend to lessen the pull of any one individual modality.

Further, why should an interpretation of unenumerated rights under the Ninth Amendment be confined to one particular modality? For instance, while it may be that the people who adopted the Ninth Amendment believed that they were reserving the "rights of Englishmen" as enumerated by Blackstone, this does not mean that we should apply only those rights, frozen in time. It may be necessary for the rights as understood by Blackstone to be modified by an ethical approach based on the history of the Constitution and our experiences in order to yield a formulation which captures the "the rights of Americans."

The point in my framing this inquiry of Ninth Amendment rights in the context of the modalities is not to argue that any one modality is superior to the others and that we *should* use only that modality to interpret and apply a specific bundle of unenumerated rights. Instead, it is to help increase the awareness of the sources and nature of rights that spring from the use of each modality, and the possibilities and limitations that each modality presents. It is not that we should interpret and apply the Ninth Amendment in a certain way. Rather, it is that we should interpret and apply the Ninth Amendment. With the rise of implied powers of the Federal Government, and the movement to strictly construe the Constitution to protect only those rights listed, we run the risk of losing those rights which the Framers intended us to have. While the Ninth Amendment may indeed be the "long-lost ark of the judicial covenant," there is no reason that it should remain so. It is time for an expedition to uncover it.

FEDERAL-STATE "NEGOTIATIONS" OVER FEDERAL ENCLAVES IN THE EARLY REPUBLIC: FINDING SOLUTIONS TO CONSTITUTIONAL PROBLEMS AT THE BIRTH OF THE LIGHTHOUSE SYSTEM

Adam S. Grace[*]

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INTRODUCTION

In the beginning months of the First Federal Congress, the newly-constituted national legislature offered states a choice that sounds very familiar to modern ears: we will provide you with funds if you do what we ask.[1] The context, though, was not an attempt by the federal government to use the Spending Clause as a tool for implementing policies otherwise unattainable within the four corners of the Constitution. Rather, the context was the new government's first intersection with what has become known as the Enclave Clause, an Article I clause that provides for federal acquisition, with state consent, of "exclusive legislation" over lands within state borders.[2] The lands in question in August 1789 were the dozen or so lighthouses that the states had built over the years.

Throughout the eighteenth century, the colonies, and then states, individually erected and maintained lighthouses that were relied upon by all boat traffic, from local fishermen, to the coasting trade, to foreign shipping.[3] In the summer of 1789, there were thirteen such lighthouses, with additional ones in the making.[4] But in July, creation of a federal tonnage policy placed control of a crucial source of state lighthouse funding in federal hands.[5] Within three weeks, Congress passed a statute (the "Lighthouse Act") establishing federal responsibility for the nation's lighthouses.[6] The fact that those lighthouses were situated on lands within state jurisdiction complicated the matter a bit.

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[1] *See infra* note 8 and accompanying text.

[2] The Enclave Clause provides that Congress shall exercise "exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." U.S. CONST. art. 1, § 8, cl. 17. From an early date, the power of "legislation" was equated with "jurisdiction." *See, e.g.*, United States v. Bevans, 17 U.S. 337, 388 (1818) ("the power of exclusive legislation (which is jurisdiction) is united with cession of territory"). The first part of article I, section 8, clause 17 provides for exclusive legislation over whatever district would become the seat of the federal government.

[3] *See generally* FRANCIS ROSS HOLLAND, JR., AMERICA'S LIGHTHOUSES: AN ILLUSTRATED HISTORY 8-12, 69-82, 105-11 (1988); DENNIS L. NOBLE, LIGHTHOUSES & KEEPERS 5 (1997) (noting that colonial lighthouses were erected near important ports of trade); XXV THE STATE RECORDS OF NORTH CAROLINA 54 (Walter Clark, William Saunders & Stephen Weeks eds., 1906) (Ch. 58 of 1789 laws, providing for erection of lighthouse on "Ocacock Island"); *see also* Adam S. Grace, *From the Lighthouses: How the First Federal Internal Improvement Projects Created Precedent That Broadened the Commerce Clause, Shrunk the Takings Clause, and Affected Early Nineteenth Century Constitutional Debate*, 68 ALB. L. REV. 97, 103 (2004) (briefly discussing state lighthouse history).

[4] See *supra* note 2 and accompanying text.

Based on the uniformity of the draft versions of the Lighthouse Act, it appears that Congress was not willing to entirely fund lighthouses without obtaining complete control over the lands on which they stood.[7] Under the Enclave Clause, however, such control could not be obtained without state consent. And so, Congress adopted a carrot-and-stick type approach: the federal government would operate and maintain the states' lighthouses, but funding would cease if the states did not cede their lighthouses by August 15, 1790.[8]

The fact that the states took the carrot and consented to cede their lighthouse properties is not in itself that surprising. But what does merit examination is *how* the states ceded their properties.[9] A number of states attached strings to their cessions, despite not having any clear guidance from the Constitution that their consent to exclusive jurisdiction could be conditioned in any way.[10] Indeed, on its face, the Enclave Clause reads as an "on/off" switch—either the state grants exclusive jurisdiction or it does not.[11] Thus, the states' responses to the Lighthouse Act provide an example of states engaging in an arguably "loose" construction of the Constitution in order to enhance their bargaining powers vis-à-vis the federal government.

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[5] Act of July 20, 1789, ch. 3, I Stat. 27. For the use of tonnage duties in funding state lighthouse operations, see Grace, *supra* note 3, at 105-06.

[6] Act of Aug. 7, 1789, ch. 9, I Stat. 53. For a discussion of the connection between the Tonnage Act and the Lighthouse Act, see Grace, *supra* note 3, at 106-17.

[7] V DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS (DHFFC) 1245-56 (Charlene Bangs Bickford & Helen E. Veit eds., 1986). The initial draft, however, tied cession of lighthouse lands only to keeping the lights "in good repair," with the federal government reimbursing monies for supporting the lights (i.e. keeping them lit) regardless. During the drafting process, all expenses became linked to cession by the states. *Id.* at 1252-53.

[8] Act of Aug. 7, 1789, ch. 9, I Stat. 53. Because the existing lighthouses were on state-owned properties, initial cessions under the Lighthouse Act included title as well as jurisdiction. In later years, when new lighthouses were constructed on private property, the federal government obtained title from the owner and a cession of jurisdiction from the state. *See* Grace, *supra* note 3, at 139.

[9] *See* FRANK L. ESTERQUEST, STATE ADJUSTMENTS TO THE FEDERAL CONSTITUTION 1789-1800, 65-73 (1943) (discussing state-federal interactions in the decade after the Constitution was ratified). With minor tweaking, the basic historical narrative set forth by Esterquest provides an accurate and helpful summary of what the states did.

The federal government's reaction to the conditions was mixed: some conditions were objected to, while others were either implicitly or explicitly accepted by the federal government without complaint.[12] Where the federal government bent, and where it did not, sheds additional light on early federal-state interactions under the Constitution.[13]

As history unfolded, the political resolutions worked out by Congress and the state legislatures prefigured solutions ultimately sanctioned by the Supreme Court more than 130 years later.[14] But the path of precedent was not a straight one. Late nineteenth and early twentieth century Supreme Court cases had different outcomes.[15] And an early lower court case by Justice Story, riding circuit, provides some evidence that the Supreme Court of the day would have done the same.[16] In sum, the flexible approach to the Enclave Clause acceded to by Congress and the executive branch was arguably ahead of its time.

Before discussing the Enclave Clause issues presented by the federal lighthouse system of the 1790s, and the way in which the federal and state governments resolved those issues, some background into both the Enclave Clause and the Lighthouse Act is necessary.

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[10] *See infra* Part II. A-B.

[11] *See supra* note 2 and accompanying text.

[12] *See infra* Part II. A-B.

[13] How the federal and state governments made adjustments in forging their relationship under the Constitution is a topic that has not received much scholarly attention. Esterquest's book, *supra* note 10, remains the most thorough treatment of the issue. For an excellent concise summary of federal-state administrative relations, see LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 389-405 (1961).

[14] *See* case cited *infra* note 85 and accompanying text.

[15] *See infra* pp. 565-69.

[16] *See infra* pp. 565-67 and note 80.

I. SETTING THE STAGE FOR FEDERAL-STATE ENCLAVE CLAUSE ISSUES

A. Adoption of the Enclave Clause by the Constitutional Convention

The records of the Constitutional Convention contain three versions of the draft language that ultimately became the Enclave Clause: (1) the version given to the Committee of Detail for their consideration, which empowered Congress to "procure and hold for the use of the United States landed property for the erection of forts, magazines, and other necessary buildings;"[17] (2) the version presented by Farrand as part of the Pinckney Plan, but most likely a draft by the Committee of Detail, empowering Congress to "provide such Dock Yards and arsenals and erect such fortifications as may be necessary for the United States and to exercise exclusive Jurisdiction therein;"[18] and (3) the version ultimately presented to the Convention by the Brearley Committee, which gave Congress the authority to exercise "exclusive legislation" over "all Places purchased for the erection of Forts, Magazines, Arsenals, Dock Yards and other needful buildings."[19]

Unlike the first two draft wordings, the language reported by the Brearley Committee assumed Congressional power both to obtain property and to erect the structures mentioned.[20] Thus, its sole focus was the grant of power to exercise "exclusive legislation" over lands used for such structures.[21] This language ultimately became the Enclave Clause,[22] with one important amendment.[23] Based on Elbridge Gerry's contention that such power might be used to "enslave any particular State," it was recommended (and agreed to) that exercise of the power be dependent on state consent.[24]

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[17] 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 321 (rev. ed. 1937).

[18] 3 *id.* at 598 app. D.

[19] 2 *id.* at 505.

[20] *Id.*

[21] *Id.*

[22] *See supra* note 2 and accompanying text.

During the ratification process, the Enclave Clause did not escape the attention of those who were suspicious of federal authority. Indeed, though it was not the subject of lengthy debate, it formed the basis for amendments suggested by the ratifying conventions of New York, North Carolina, Pennsylvania, and Virginia. The two different amendments suggested by those states (North Carolina, Pennsylvania, and Virginia offered the same amendment) were both aimed at limiting the operation of federal power within the enclaves.[25] New York's proposal—that the Enclave Clause not be construed as authorizing Congress to make any law preventing state law from extending to any enclave – addressed how enclaves were to relate to the states within which they were placed.[26] The other proposed amendment—that the right of exclusive legislation, both over the capital and over federal enclaves, extend only to regulations regarding "the police and good government thereof"—more broadly addressed a concern that Congress's power over federal lands not be used abusively (even, perhaps, in derogation of enumerated powers).[27]

Reflections of the latter concern can perhaps be seen in lighthouse cession laws that expressly linked federal jurisdiction to continued use of the lands for the purposes of lighthouse operations.[28] In addition, two other issues raised during ratification debates (but not included in any proposed amendments to the Constitution) ultimately became relevant during the very first lighthouse cessions under the Enclave Clause: (1) the fear that federal enclaves could become "sanctuaries" enabling fugitives from state justice to "escape with impunity" to lands where "the states had no power to punish them;"[29] and (2) an interpretation of the state consent requirement as empowering states to stipulate the terms of the grant.[30]

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[23] 2 FARRAND at 510.

[24] *Id.*

[25] That was the same issue raised by Gerry during the Constitutional Convention. Debaters during ratification argued that the state consent requirement adequately answered any fears of abuse. *Compare* 3 ELLIOT'S DEBATES 51 (rev. ed. 1937) (Henry, June 5, 1788), *with id.* at 434-35 (Nicholas, June 16, 1788), 455 (Madison, June 17, 1788).

[26] 1 ELLIOT'S DEBATES 330.

[27] 2 ELLIOT'S DEBATES 545 (Penn.); 3 *id.* at 660 (Va.); 4 *id.* at 245 (N.C.).

[28] *See infra* note 39 and accompanying text.

The concern over fugitives led to the primary Enclave Clause dispute, which was resolved in the 1790s.[31] The power of states to set conditions was also implicated in the early lighthouse cessions, with political resolutions that did not receive court sanction until over 130 years later.[32] Before addressing the Enclave Clause issues that played out in practice during the early years of the republic, it is useful to provide some brief information about the creation of the lighthouse system.

B. *Creation of the Federal Lighthouse System*

When passage of the Tonnage Act swallowed up a crucial state source of lighthouse funding, the federal government magnanimously stepped in to temporarily fund lighthouse operations and maintenance.[33] But after one year, the states would have to make a choice: Any state wanting the federal government to permanently assume responsibility for the state's lighthouses would have to cede jurisdiction over its lighthouse properties to the federal government.[34] What transpired, as I have previously described elsewhere,[35] can be summarized as follows:

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[29] 3 ELLIOT'S DEBATES 454-55 (Tyler, June 17, 1788). When a member of the Virginia ratifying convention suggested that the nation's capital in particular would become a haven for felons, *id.* at 435 (Grayson, June 16, 1788), Richard Henry Lee provided a response whose accuracy may seem more subject to question these 200 years later: "Were the place crowded with rogues, he asked if it would be an agreeable place of residence for the members of the general government . . . . Would the people be so lost to honor and virtue, as to select men who would willingly associate with the most abandoned characters?" *Id.* at 435-36 (Lee). But in addition to relying on public virtue, Lee also contended that protecting felons in either the capital or other federal enclaves would be contrary to the Constitution. *Id.* at 436.

[30] *Id.* at 439 (Madison, June 16, 1788); 4 *id.* at 219 (Iredell).

[31] *See infra* note 76 and accompanying text.

[32] *See infra* note 86 and accompanying text.

[33] *See supra* note 5 and accompanying text.

To Massachusetts' Lieutenant-Governor Samuel Adams, who distrusted federal power, the Lighthouse Act presented no real choice at all: states were being forced to consent by economic coercion.[36] Adams suggested to Elbridge Gerry (a member of the Committee that had drafted the legislation) that Congress would end up as the British government had if, by governing "too much," it unnecessarily forced states to yield exclusive jurisdiction to the federal government.[37] He was particularly rankled by the interplay between the Tonnage and Lighthouse Acts:

> The Means of supporting these Buildings in this State are taken from its Legislature—It is presumed not to be intended that this Legislature shall be told at the End of the Year, you must cede your Lighthouse to Congress [and] the Territory on which it stands together with the exclusive Power of Legislation, or it shall be of no Use to your state."[38]

Regardless of such sentiments, state legislatures—including that of Adams's own Massachusetts—ceded their lighthouses fairly promptly and without much controversy.[39] The only significant holdout was (not surprisingly) Rhode

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[34] *See supra* note 8 and accompanying text.

[35] *See* Grace, *supra* note 3, at 124-25.

[36] *Id.* at 123

[37] *Id.*

[38] Letter from Samuel Adams to Elbridge Gerry, Sept. 1789, *reprinted in* 17 DHFFC, *supra* note 7, at 1645.

[39] For the dedicated reader, a summary of existing lighthouse cessions is provided:

By June 1790, six states had ceded their lighthouses; their enactments covering the vast majority of the lighthouses then in operation: Pennsylvania (Act of Sept. 28, 1789, ch. 502, 1789 Pa. Laws 743-44); Virginia, (Act of Nov. 13, 1789, ch. 5, 1789 Va. Acts 4); South Carolina (Act of Jan. 20, 1790, 1790 S.C. Acts 13-14); New York (Act of Feb. 3, 1790, 1790 N.Y. Laws 106-07); Connecticut (Act of May 2, 1790); Massachusetts (Act of June 10, 1790, ch. 4, 1790 Mass. Acts 77-78).

Island, which did not cede its lighthouse until 1793. However, the state was never denied federal lighthouse monies because each time the cession deadline came up, Congress extended it for another year.[40] Thus, rather than forcing the issue by cut-

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In June 1790, New Hampshire's House of Representatives had approved a joint committee's recommendation to cede the lighthouse. For reasons that remain unclear—but that appear to be related to a debate over how much land should be ceded—nothing happened until February 1791, when the state ceded a *larger* amount than had been proposed a year earlier. XXII EARLY STATE PAPERS OF NEW HAMPSHIRE 68 [June 14, 1790] (Albert S. Batchellor ed., 1891); Letter from Joseph Whipple to Alexander Hamilton (July 23, 1790), *in* THE STATE PAPERS OF ALEXANDER HAMILTON 508-09 (Harold C. Syrett ed., 1962) [hereinafter Syrett], printed in 6 Syrett 508; Act of Feb. 14, 1791, ch. 71, 1791 N.H. Laws 10.

New Jersey and Delaware, both of which had lighthouses located within their boundaries but that were controlled by other states, ceded their rights in November 1790 and January 1791, respectively. It is conceivable that the federal government did not immediately recognize the need for cessions from those two jurisdictions. *See* Hamilton to Washington (June 18, 1790), Report on Lighthouses (stating that there were no lighthouses in either state).

In November 1790, North Carolina ceded two properties that had been set aside for lighthouses (one of which was already under construction). North Carolina Act of Nov. 1790, ch. 2, 1790 N.C. Sess. Laws 484. Strictly speaking, the Lighthouse Act only called for cession of existing lighthouses, but the premature cession of course would of course redound to the monetary benefit of North Carolina.

Georgia did not cede its lighthouse until December 1791, but the condition of the lighthouse between August 1789 and 1791 is unclear. HOLLAND, *supra* note 3, at 107; John Habersham to Alexander Hamilton (Nov. 2, 1790), *in* 7 Syrett 136 (discussing plans for construction of a lighthouse on Tybee Island).

[40] Rhode Island Act of May 1793; *see* 1st Cong., sess. II, ch. 32 (July 22, 1790); 1st Cong., sess. III, ch. 24 (Mar. 3, 1791); 2nd Cong., sess. I, ch. 17 (Apr. 12, 1792). As of August 1790, Rhode Island was still collecting light money for its lighthouse at Newport, and the shipping trade complained of their obligation to pay tonnage to the United States and light money to the state. Letter from William Ellery to Alexander Hamilton, (August 23, 1790), *in* 9 Syrett 93-96. The next month, Rhode Island fixed the problem, repealing its lighthouse regulations because "the provision made by Congress, for defraying the expense of light houses within the United States, is extended to this state." 10 RECORDS OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 391 (John Russell Bartlett ed., AMS Press 1968). Nothing was done about cession, however.

The matter was first raised by Rhode Island's legislature in May 1791. At that point, the lower house passed a bill for cession, but the bill was stopped in the upper house "by the opposition made to it principally by the Governour," who "declared against making any cession to the United States." Letter from William Ellery to Alexander Hamilton (May 9, 1791), *in* 8 Syrett 332. In November 1791, William Ellery recorded opponents of the cession as having told a leading member ting off funds and holding firm to its mandated deadlines, the federal government stuck with a carrot-and-stick approach, combined with gentle backroom lobbying.[41]

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of the lower house that "there was time enough to cede hereafter, and [they] thought it best to hold their right as long as they could." *Id.* (Nov. 11, 1791), *in* 9 Syrett 493-94; *see also id.* (July 4, 1791), *in* 8 Syrett 529 (noting that the United States was continuing to defray expenses until July 1792, and was allowing states that additional time to make cessions).

So long as the United States kept extending the cession deadline, and continued to fund the lighthouse, the legislature felt no pressure to act. This state of affairs dragged on for two years. The legislative history is silent as to the motives underlying the cession opponents, but as title to the lighthouse apparently was in private hands, one wonders whether public officials were putting their weight behind the owner (Jerathmel Bowers). In his letter to Hamilton noting the Governor's opposition to cession, Ellery passed on the port surveyor's opinion that after the legislature shall have ceded their right and title, "Mr. Bowers will not convey the fee to the United States, he is so tenacious of landed property. . . . " *Id.* (May 9, 1791), *in* 8 Syrett 332-33; *see also id.* (Aug. 2, 1790), *in* 6 Syrett 550; *id.*, (Mar. 7, 1791), *in* 8 Syrett 163.

[41] Although Rhode Island was the only holdout, circumstances (discussed in Part II) led Congress to grant a series of deadline extensions through mid-1798. *See* 2nd Cong., sess. II, ch. 27 (Mar. 2, 1793) (one-year extension); 3rd Cong., sess. I, ch. 59 (June 7, 1794) (same); 3rd Cong., sess. II, ch. 37 (Mar. 2, 1795) (same); 4th Cong., sess. I, ch. 43 (May 30, 1796) (two years). The extensions from 1793 to 1795 likely resulted from a question concerning the adequacy of the cessions that had been passed by a handful of state legislatures.

The extension to 1796 could have been caused by the fact that one lighthouse in Massachusetts was not ceded until June 23, 1795. The lighthouse in question (Brant Point, on Nantucket) had been destroyed by storm in 1788. It was not in existence in June 1790, and was rebuilt by the town at some time between then and 1795. Months before the legislature ceded it to the federal government, a Treasury Department official supervising the lighthouse system had specifically written that cession was necessary for the light to remain in the federal lighthouse establishment. *See* ADMONT G. CLARK, LIGHTHOUSES OF CAPE COD—MARTHA'S VINEYARD—NANTUCKET THEIR HISTORY AND LORE 141; HOLLAND, *supra* note 3, at 72; Letter from Alexander Hamilton to George Washington (June 18, 1790), *in* 6 Syrett 468 (listing only six, not seven, lighthouses in Massachusetts); Letter from Tench Coxe to Coffin (Mar. 3, 1795), *microformed on* M63 (Nat'l Archives & Records Admin.); Massachusetts, Act of June 23, 1795, ch. 17, 1975 Mass. Acts 504-04. Brant Point was one of only a handful of lights built locally in the 1790s, and then turned over to the United States. *See* III House Journal 577 (Jan. 30, 1800) (petition from merchants and citizens who built Clark's Point lighthouse at their expense); 5th Cong., Sess. II, Ch. 78 (July 16, 1798) (compensating Savannah commissioners of pilotage for erection of beacon and placement of buoys at entrance of port).

There is no historical evidence explaining why Congress enacted an addition-

So far as can be gleaned from the historical record (and as common sense would suggest), it was that carrot of federal funds—the practical realities presented by the Tonnage and Lighthouse Acts—that provided the impetus for the states' unanimous cession of lighthouses to the federal government. For example, in Massachusetts, after the first reading of the Senate's bill providing for the cession of the state's public lighthouses, the House ordered "that the Commissary General lay before the House an account of the expenses of the Light Houses, the annual cost of lighting the same, and the probable amount of the necessary repairs."[42] The bill passed swiftly the next day.[43]

However, economic motive should not be mistaken for a lack of principle. The actions of the state legislatures suggest that, as a whole, they simply did not share Samuel Adams's views of lurking danger. One can contrast the Massachusetts legislature's response to the Lighthouse Act with its response to the federal government's request for cession of a fort ("Castle Island") in Boston Harbor during the 1794 national defense crisis. In the latter instance, the legislature stonewalled for years, and the public debate included a letter to a local newspaper proclaiming "Let us . . . not be too lavish in surrendering our territory to Congress."[44]

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al two-year extension in 1796, but it is possible that the extension was intended to cover existing and subsequent projects for the construction of new lighthouses.

[42] Notation on bill jacket for Lighthouse Bill, and House Journal entry for June 8, 1790 (p. 71), both on file at the Massachusetts State Archives.

[43] House Journal entries for June 9 (pp. 73, 78), on file at the Massachusetts State Archives. North Carolina's act of cession specifically included a whereas clause referring to the fact that "the funds heretofore appropriated by this state [for lighthouses] are now vested in [Congress] ...." North Carolina, Act of Nov. 1, 1790, ch. 2, 1790 N.C. Laws 65.

[44] ESTERQUEST, *supra* note 9, at 107 n.1 (quoting INDEPENDENT CHRONICLE, June 5, 1794). At the time Massachusetts turned over its lighthouses in 1790, it was scrabbling together money for the garrison at Castle Island. *See, e.g.*, Resolve of June 25 1789, ch. 95, 1789 Mass. Acts 30; Reolve of Jan. 22, 1790, ch. 23, 1790 Mass. Acts 47; Resolve of June 23, 1790, ch. 59, 1790 Mass. Acts 22 (funding the garrison's pay roll by borrowing funds, or borrowing on credit of particular taxes). Yet it continued to fund the garrison—without the aid of tonnage duties, which had previously been relied on—for years after that, and held on to

It is impossible to determine whether other available funding sources, such as lotteries, would have been workable alternatives for states instead of complying with the Lighthouse Act.[45] But it is telling that no state decided to give them a try. Evidently, the concept of having a federal lighthouse keeper on a federal enclave within state territory did not sufficiently raise the hackles of many. Moreover, the positive collective state response to the Lighthouse Act is reflective of contentment with the Act's broader implications: there was to be a national lighthouse system, organized and controlled by the federal government, with federal officials making personnel decisions and decisions of whether or where new lighthouses were to be built.

The significance of the latter decisions should not be lightly dismissed. Regardless of the principled position staked out by Samuel Adams in his letters to Elbridge Gerry, Adams's motivation in writing them was an attempt to protect a friend's job under the new federal lighthouse regime.[46] Needless to say, Adams was not the only such lobbyist.

Employment decisions were not the only topics for lobby-

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the fort until 1798. ESTERQUEST, *supra* note 9, at 101-03, 106-08.

[45] State use of lotteries to generate funds for improvements (as well as other legislative purposes) continued after 1789, and other forms of taxes were at least conceivable means of replacing monies lost to the federal government. South Carolina is a good example of both. In 1791, South Carolina instituted a license fee on billiard tables and liquor shops in order to provide a pilot and pilot boat for the port of Georgetown. Although the federal government left state pilot regulations in place in the Lighthouse Act, South Carolina's fund for pilots had run dry, apparently because the legislature felt that the right to collect duties for pilot services had been ceded to the federal government. *Id.* at 191-92.

In 1795, South Carolina authorized a lottery for clearing out and removing obstructions in the Savannah River in order to open navigation between points in their state and Augusta, Georgia. South Carolina Act of Dec. 12, 1795; *see also* South Carolina Act of Dec. 16, 1797, 1797 S.C. Acts 153 (appointing commissioners to clear out and make the Saluda river navigable, and authorizing them to raise subscriptions or establish a lottery to carry out the purposes of the act); South Carolina Act of Dec. 12, 1795, 1795 S.C. Acts 18 (authorizing a lottery for promotion of useful manufactures).

[46] Letter from Samuel Adams to Elbridge Gerry (Aug. 20, 1789), *reprinted in* 16 DHFFC, *supra* note 7, at 1362; Letter from Samuel Adams to Elbridge Gerry (Aug. 22, 1789), *reprinted in* 16 *id.* at 1371.

ists. Within months of the Lighthouse Act taking effect, a Massachusetts merchant lobbied George Washington for construction of a new lighthouse on the Island of Seguin.[47] Federal lighthouse projects required federal justification, and merchants and state politicians looking to obtain a new lighthouse for their shores understood the magic "national interest" language they needed to include in their petitions to Congress.

On the other hand, a remarkable letter by the federal government's superintendent of lighthouses in Massachusetts amply demonstrates that federal-state lobbying could also be a two-way street. When the superintendent, Benjamin Lincoln, had to follow up with Massachusetts's governor regarding an expected cession of land for a new federal lighthouse, his emphasis on the project's local benefits leave the modern reader wondering about the constitutionality of Congress' motives:

> I learn that the cession has not been made. I am therefore induced to state this to your Excellency which I do in the most perfect confidence that as the Law for erecting the Light *sprang more from consideration of peculiar advantages to our fishermen & coasters than general utility to the navigation of the Union* the measure will meet the early attention and support of the Legislature of this State.[48]

Whether or not Lincoln's obvious sales pitch can be taken at face value, it was certainly the case that national interests did not always align perfectly with local interests—interests that themselves might be split into competing lobbying groups.[49]

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[47] Letter from Samuel Goodwin to George Washington (Nov. 25, 1789), *in* 4 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES, at 323 (Dorothy Twohig ed., 1993).

[48] Letter from Benjamin Lincoln, Superintendent, to Governor Strong, Massachusetts Governor (June 5, 1800) (on file in the Massachusetts State Archives) (emphasis added). The letter was read in both houses of the Massachusetts legislature, and was included in the bill jacket for the legislation that was passed one week later.

[49] *See, e.g.*, II House Journal 328 (Feb. 16, 1795) (petition seeking erection of light on Damascove Island instead of Seguin Island); II House Journal 73 (Feb. 26, 1794) (petition seeking placement of light on Shell-Castle Island instead of

In sum, the states' acceptance of a federally operated lighthouse system may have been an obvious economic decision, but it was not cost—free. Giving up control over lighthouses meant more than giving up the responsibility of purchasing the oil and lighting the wicks. It also meant more than giving up personnel and construction decisions. Under the federal acquisition policy that so irked Samuel Adams, turning lighthouses over to the federal government meant that states would have to give the federal government exclusive jurisdiction over properties within their boundaries.[50]

The history of state responses to the Lighthouse Act reflects that state legislatures were not as troubled by such jurisdictional grants as Samuel Adams.[51] On the other hand, they did not uniformly cede their lighthouses without qualification.[52] Given both the lure of federal funding and state acquiescence to broad federal involvement in lighthouse operations, one might expect that states simply answered the call of the Lighthouse Act by ceding their lighthouses with no strings attached. And, indeed, some states did just that. Other states, though, were concerned about the details regarding the nature of the cessions they were being asked to make—and, no doubt, they must have recognized that the federal government's desire to acquire exclusive control over the lighthouse properties gave them some bargaining leverage.[53] Those states addressed those concerns by imposing conditions in their acts of cession.

By imposing conditions, they were protecting themselves with a tool not explicitly provided to them by the Enclave

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Ocracock Island).

[50] *See supra* note 8 and accompanying text.

[51] *See supra* note 39 and accompanying text.

[52] *See supra* notes 40, 41 and accompanying text.

[53] If the federal government were simply, out of a sense of fairness, offering a chance for federal monies, with no desire to actually be taken up on that offer, then all state leverage would have disappeared. However, both Congress (in extending cession deadlines and in providing for additional lighthouses), and the Treasury Department (which administered the early lighthouse program with great vigor), exhibited an unadulterated desire to run a strong federal lighthouse program. Though born out of federal tax policy, the federal lighthouse program became a proud symbol of federal action.

Clause. On its face, the Enclave Clause presents an on/off switch: either a state consents to exclusive jurisdiction, or it does not.[54] The states that conditioned their consent were seeking a middle ground. Sometimes the federal government yielded that ground, sometimes it did not. The remainder of the paper addresses how the federal government responded to the types of conditions sought by states that qualified their consent.

II. EARLY FEDERAL RESPONSES TO STATE CONDITIONS UPON ENCLAVE CLAUSE CESSIONS

A. *Continued State Jurisdiction for Purposes of Civil and Criminal Legal Process*

Lighthouses were intended to safeguard lives and property from the hazards of the sea; they were not meant to protect people running from the law.[55] State legislatures, like the ratification conventions before them, recognized the possibility that a grant of exclusive federal jurisdiction could turn lighthouse properties into sanctuaries for people seeking to avoid state judicial process. [56]Three states—Massachusetts, New Hampshire, and Rhode Island—included jurisdictional "carve-outs" in their initial cessions of lighthouses, asserting a retention of power to execute all civil and criminal process on the ceded lands.[57] In 1792, New York followed suit when it ceded jurisdiction over unimproved land for construction of a lighthouse at Montauk.[58]

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[54] *See supra* note 2 and accompanying text.

[55] *See supra* note 29 and accompanying text.

[56] Report from N.H. House of Representatives Committee on the propriety of ceding the light house in their State to the United States (Feb. 8, 1791) (recommending that land be ceded "reserving to this State the right of pursuing and apprehending all person who may escape from the pursuit of any officers of this State and take refuge within said Territory . . . .") (on file at New Hampshire Department of Records Management and Archives; copy on file with the author).

[57] Rhode Island Act of May 1793, 1793 R.I. Pub. Laws 21; New Hampshire Act of Feb. 14, 1791, ch. 71, 1791 N.H. Laws 374; Massachusetts Act of June 10, 1790, ch. 4, 1790 Mass. Laws 77. The proviso in Massachusetts's cession act read as follows: "*Provided also*, That all civil and criminal processes issued under the authority of this Commonwealth, or any officers thereof, may be executed on any of said lands, or in any of said buildings; in the same way and manner, as if the jurisdiction had not been ceded as aforesaid." Act of June 10, 1790, ch. 4, 1790

Although the jurisdictional carve-outs were no more than an attempt by a handful of states (notably New England and New York) to ensure that state judicial process could reach all of its citizens, the Washington administration became concerned that the states' reservation of jurisdiction over lighthouse lands violated both Congress's lighthouse legislation and the Constitution. The Massachusetts and New Hampshire provisions may well have escaped federal notice initially, but the language in New York's passage of the Montauk cession in December 1792 did not.

In May 1792, Secretary of Treasury Alexander Hamilton appointed Commissioner of Revenue Tench Coxe to supervise federal lighthouse operations.[59] In early 1793, Coxe reviewed the recent Montauk cession and forwarded it to Hamilton with his opinion that New York's reservation of jurisdiction was inconsistent with both the Constitution's Enclave Clause and Congress's law regarding creation of a light at Montauk.[60] Hamilton, in turn, sought the opinion of Attorney General Edmund Randolph.

Randolph's analysis raised, and in good lawyerly fashion dodged, any constitutional question presented by New York's potentially "non-exclusive" cession of jurisdiction, but the Attorney General opined that the state law was fatally inconsistent with Congress' Montauk statute:

> When I first read your letter, inclosing the cession of Montok-

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Mass. Laws 77, 78.

[58] New York Act of Dec. 18, 1792, ch. 4, 1792 N.Y. Laws 384.

[59] Letter from Alexander Hamilton to Tench Coxe (May 22, 1792), *in* 11 Syrett 416. The circumstances underlying Coxe's appointment in May 1792 are described in JACOB E. COOKE, TENCH COXE AND THE EARLY REPUBLIC 239-42 (1978).

[60] Letter from Tench Coxe to Alexander Hamilton (Jan. 3, 1793), *in* 13 Syrett 447. In April 1792, Congress passed a statute providing for construction of a lighthouse "as soon as the jurisdiction of such land on Montok Point in the state of New York . . . shall have been ceded to the United States." Act of Apr. 12, 1792, ch. 18, 1 Stat. 251.

> point, I suspected, that it would be necessary to travel into a wide constitutional field. I was apprehensive, that I should be obliged to inquire, whether congress, even if they were so disposed, could accept a cession, with a reservation of state-jurisdiction. But when I adverted to the act, which directs a lighthouse to be built on Montok-point, it became obvious, that congress did not mean to accept this cession, with a mutilated jurisdiction. The words are: "As soon as the jurisdiction shall have been ceded:" that is, as soon as New-York shall have relinquished her jurisdiction. It is manifest, that this has not been done; and therefore the act of New-York is not commensurate with the act of congress.[61]

Believing New York's cession to be inadequate, the administration determined that it could not proceed with construction of the Montauk lighthouse until the matter of jurisdiction was resolved.[62] And apparently by chance, though no doubt with his antennae raised, only two weeks after having written to Hamilton about the Montauk law, Coxe reviewed a report containing a copy of Massachusetts's June 1790 cession statute and similarly informed Hamilton that the Massachusetts proviso appeared to violate both the Lighthouse Act and the Constitution.[63] If New York's retention of jurisdiction was not valid, neither was any other state's.

The Washington Administration sought to resolve the exclusive jurisdiction problem in Congress, as Coxe explained in a letter updating New York's senators and representatives regarding the Montauk light:

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[61] Letter from Edmund Randolph to Alexander Hamilton (Jan. 7, 1793), *in* 13 Syrett 472-73 (footnote call number omitted).

[62] Letter from Tench Coxe to Senators & members of the House of Representatives of the Congress of the U.S., N.Y. (Sept. 7, 1793), *microformed on* M63 (Nat'l Archives & Records Admin.); 1 AMERICAN STATE PAPERS, MISCELLANEOUS (Class 10), Ser. 37, No. 58 (committee report communicated to the House on Dec. 17, 1794).

[63] Letter from Tench Coxe to Alexander Hamilton (Jan. 19, 1793), *in* 13 Syrett 503. In his letter, Coxe suggested to Hamilton that Randolph's opinion be obtained regarding whether Massachusetts' cession was made "in such manner as to be availing and of effect" under both the Constitution and federal statute. There is no evidence that any additional opinion was obtained from Randolph, and it is conceivable that Hamilton would have concluded that the Montauk opinion he already had obtained sufficiently answered the same questions arising under the Massachusetts law.

> The Attorney General having given an opinion of the insufficiency of the cession considered in connection with the act of Congress, and the act of cession having in consequence been laid by the President before the Legislature, it remains to qualify the Law of the Union, or of the state, so as to produce the necessary concordance. It appears at present not improbable that due consideration of the subject may produce about the beginning of the next session a suggestion from the executive in favor of a new act of Congress comprehending all the lighthouse Lands, to proceed upon the Idea of a concurrent Jurisdiction in the Federal and state governments.[64]

Thus, although Coxe's letter mentions the possibility of a change in state law, the administration's approach (as seen in the last sentence of the quote above) focused on seeking a modification from Congress permitting cessions of something less than exclusive jurisdiction. Though the matter proceeded slowly,[65] in January 1794, Washington sent a message to both houses of Congress that included the following paragraph:

> The laws respecting light-house establishments require, as a condition of their permanent maintenance, at the expense of the United States, a complete cession of soil and jurisdiction. The cessions of different States having been qualified with a

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[64] Letter from Tench Coxe to the Senators & members of the House of Representatives of the Congress of the U.S., N.Y. (Sept. 7, 1793), *microformed on* M63 (Nat'l Archives & Records Admin.). In fact, Washington had simply laid the Montauk statute before Congress, without Randolph's opinion and without any apparent elaboration on the issue. Message from the President, Feb. 27, 1793, printed in Journal of the House.

[65] In February 1793, Washington laid New York's Montauk statute before Congress. 1 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, 1789-93, at 721 (Gales & Seaton 1826). Nine months later, in November 1793, the incomplete cessions were listed as a topic to be communicated in Presidential speeches and messages. Objects to be communicated in Speech & Messages (Nov. 1793), *in* 15 Syrett 429-30: "XIII Communication of the state of cessions of Light Houses. The Cession in various instances has not been intire; it has reserved a partial right of jurisdiction for *process*; consequently is not strictly conformable to law."

> reservation of the right of serving legal process within the ceded jurisdiction, are understood to be inconclusive, as annexing a qualification not consonant with the terms of the law. I present this circumstance to the view of Congress, that they may judge whether any alteration ought to be made.[66]

As suggested by Coxe's letter to the New York congressmen, the President was comfortable with the concept of a limited concurrent jurisdiction, but was simply uncomfortable accepting cessions that he did not believe himself authorized to accept.[67]

Congress ended up yielding to the states' jurisdictional carve-outs, but it took them an extra fourteen months after Washington's message to do so. Given that the House rejected a cession bill in June 1794, the delay must have been attributable at least in part to disagreement within Congress.[68] However, rejection of the bill came only weeks after the House had passed a resolution deeming the Montauk cession "good and sufficient,"[69] and any disagreement regarding a permanent fix might well have stemmed from either separation of powers concerns or from the draft bill having gone broader than necessary (or desired) in describing the scope of permissible reservations. The bill had its origins in a House committee recommendation that a "committee be appointed to bring in a bill to authorize the President of the United States to receive cessions of land . . . notwithstanding the jurisdiction of the State may be reserved, except so far as respects the real or personal property of the United States."[70] In contrast, the legislative solution ultimately agreed upon in March 1795 did not focus on granting the executive branch authority to accept cessions, and did not extend federal acceptance to reservations beyond those concerning state process. Rather, the new law simply declared that cessions reserving jurisdiction for execution and service of state civil and criminal process *shall* be deemed sufficient under federal laws providing for support or erection of lighthouses, beacons, buoys and public piers.[71]

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[66] 2 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, 1793-1797, at 46 (Gales & Seaton 1826).

[67] As Leonard White has pointed out, Washington's general practice of deference to Congress led him to submit messages that suggested subjects for consideration without officially indicating which policy he thought they should pursue. LEONARD D. WHITE, THE FEDERALISTS 54-55 (1948). It is difficult to imagine, though, that Congress would not have been aware of a preference by Washington that Congress yield on the point.

[68] 2 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, 1793-1797, at 200 (Gales & Seaton 1826).

[69] *Id.* at 152.

[70] 1 AMERICAN STATE PAPERS, MISCELLANEOUS (Class 10), Ser. 37, No. 52

Had Congress satisfied itself that a mere reservation of jurisdiction for process did not violate its lighthouse-related laws, the matter may well have ended with Congress' own interpretation of its statutes leaving the status quo in place. As it was, the March 1795 statute reflects that Congress concurred with the executive branch that state and federal law were in conflict, and decided that it would be appropriate to modify federal law and accept something less than a complete cession. Thus, Congress agreed to yield to the States' retention of jurisdiction for process, and agreed to accept something less than the complete jurisdiction originally contemplated in their lighthouse statutes.

Less clear is whether Congress was operating on the assumption that it could constitutionally accept less than the "exclusive" authority mentioned in the Enclave Clause. As we saw above, both the Attorney General and the Commissioner of Revenue questioned whether the Constitution permitted states to qualify their consent to federal enclaves by retaining some state jurisdiction over the enclave. If retention of jurisdiction were not permitted by the Enclave Clause, then a federal statute permitting such state jurisdiction would itself be unconstitutional.

("Reservations in the Cessions of Land for Light-Houses"). The wording of the recommendation is puzzling, given that the committee, in reviewing state cessions that reserved jurisdiction for service of process, concluded simply that cessions "under such limitations" would be "fully sufficient for the purpose for which such cessions are required." *Id.*

[71] Act of Mar. 2, 1795, ch. 40, 1 Stat. 426. The statute further provided that where the federal government held lands ceded without such reservation of jurisdiction, it would act as if a reservation for process had been made. *Id.*

However, there are two ways the March 1795 law could be squared with the Constitution: (1) interpreting the Enclave Clause as providing for exclusive jurisdiction where a state so consents, but permitting the federal government to accept something less than exclusive jurisdiction based on a "qualified" consent; or (2) interpreting the power to execute process as something that does not truly interfere with Congress's exclusive control over federal enclaves. The historical record does not permit a firm conclusion as to Congress's thinking on this question.

On the one hand, the legislative history explicitly approves of state "reservation of concurrent jurisdiction."[72] On the other hand, the law as enacted did not use the phrase "concurrent jurisdiction." And although that language does appear in the House committee's report, the committee had concluded that the "reservation of concurrent jurisdiction" did not obstruct the purposes underlying the federal government's cession requirement. From there, it may be a matter of semantics whether the committee was sanctioning true "non-exclusive" federal control, or whether it was simply suggesting that the state cessions in question did not truly threaten the exclusive nature of the federal government's control.

The constitutionality of the March 1795 law was not going to be tested in court anytime soon—not with Congress yielding to state demands and the executive branch concurring in the policy. But as state-federal jurisdictional issues arose over federal enclaves, early nineteenth century judges did end up wrestling with the constitutionality of Congress' approach in the March 1795 law.

In *United States v. Cornell*, the defendant was charged with committing a criminal act on federal property.[73] The act occurred in a federal fort built on land acquired by the United

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[72] 1 AMERICAN STATE PAPERS, MISCELLANEOUS (class 10), Ser. 37, No. 58 ("Concurrent Jurisdiction Granted to Those States That Have Ceded Lands for Light-Houses Without Reservation") (report by Committee recommending bill); House Journal, Jan. 22, 1795 (following Committee recommendations by passing resolution appointing a committee to draft a bill).

[73] United States v. Cornell, 25 F. Cas 646, 648 (D.R.I. 1819) (No. 14867).

States subject to a Rhode Island law retaining the power to execute state process on the federal land.[74] Justice Story (riding circuit in New England), instructed the jury regarding whether the alleged acts occurred in a place within the "sole and exclusive jurisdiction" of the United States and, thus, subject to federal court jurisdiction.[75] Story's analysis applied the second argument laid out above, that state service of process did not render federal jurisdiction non-exclusive.[76] He further suggested that if the service of process proviso were *not* interpreted that way, it could well run afoul of the Constitution:

> For it may well be doubted whether congress are by the terms of the constitution, at liberty to purchase lands for forts, dockyards, &c. with the consent of a state legislature, where such consent is so qualified that it will not justify the "exclusive legislation" of congress there. It may well be doubted if such consent be not utterly void. 'Ut res magis valeat quam pereat,' we are bound to give the present act a different construction, if it may reasonably be done; and we have not the least hesitation in declaring that the true interpretation of the present proviso leaves the sole and exclusive jurisdiction of Fort Adams in the United States.[77]

Thus, Congress's approach to the service of process issue in

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[74] *Id.*

[75] *Id.*

[76] *Id.* at 649 (stating that the state law did not contain any reservation of concurrent jurisdiction or legislation; that the proviso was apparently intended to prevent federal lands from becoming a sanctuary for fugitives who committed acts within state jurisdiction; and concluding that "[t]here is nothing incompatible with the exclusive sovereignty or jurisdiction of one state, that it should permit another state, in such cases, to execute its processes within its limits"); *see* Commonwealth v. Clary, 8 Mass. (1 Tyng) 72 (1811) (dismissing indictment because offense charged occurred on territory under exclusive control of the federal government, notwithstanding state's reservation of right to serve process).

[77] *Cornell*, 25 F. Cas. at 649. Earlier in his instructions, Justice Story opined that when a state legislature consents to the purchase of federal lands, the land purchased "by the very terms of the constitution ipso facto falls within the exclusive legislation of congress, and the state jurisdiction is completely ousted." *Id.* at 648 (stating that "the consent of the state legislature is by the very terms of the constitution . . . a virtual surrender and cession of its sovereignty over the place").

1795 eventually received judicial sanction. But if the presence of the phrase "concurrent jurisdiction" in the legislative history represents an interpretation of the Constitution as broadly permitting state imposition of conditions upon federal jurisdiction over federal enclaves, such an interpretation likely would have been rejected in the early nineteenth century by Justice Story.[78] Moreover, the Supreme Court did eventually reject that interpretation in 1885.

Nearly sixty years after Justice Story's opinion, the Supreme Court set forth a framework for handling jurisdictional issues regarding federal enclaves that incorporated Story's interpretation that a state's consent to federal purchase of lands automatically vests exclusive authority over the lands in the federal government.[79] Conditions on federal exclusive legislative authority could only be imposed by a state in situations where the federal government acquired its land in some method other than purchase with state consent.[80] In sum, under nineteenth-century jurisprudence, the Enclave Clause permitted only exclusive jurisdiction, and the power of consent could not be used to impose conditions qualifying federal jurisdiction.

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[78] In his commentaries on the Constitution, Justice Story suggested that the reservation for service of process had not been thought inconsistent with the enclave clause because "the state process, *quoad hoc*, becomes the process of the United States, and the general power of exclusive legislation remains with congress. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1225, at 127 (1858).

[79] Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 532 (1885) ("When the title is acquired by purchase by consent of the Legislatures of the States, the federal jurisdiction is exclusive of all State authority."). The Court concluded that such a proposition followed "naturally from the language of the constitution." *Id.* at 537-38.

[80] *Id.* at 537-39; *see* Newcomb v. Inhabitants of Rockport, 66 N.E. 587, 589 (Mass. 1903) ("[T]he distinction which now prevails is between land purchased of a state with the consent of its Legislature, over which, by the terms of the Constitution, the jurisdiction of the United States is exclusive, and land over which the state merely cedes jurisdiction. In the latter case, if the states [sic] attaches conditions, their validity depends upon whether they interfere with the use for which the jurisdiction is ceded.").

Siding again with Justice Story, the Court deemed service of process reservations as not "interfering in any respect with the supremacy of the United States" over federal enclaves. *Fort Leavenworth R.R.*, 114 U.S. at 533.

The law after that became a bit more muddled, until 1937 when the Supreme Court eventually reversed course and upheld the constitutionality of state restrictions on federal exclusive jurisdiction in cessions under the Enclave Clause.[81] In a nutshell, this is how federal property law was transformed from the initial prohibition of conditional cessions under the Enclave Clause: first, the Court recognized jurisdictional cessions beyond Article I federal enclaves, sanctioning federal jurisdiction over property held under Article IV of the Constitution ("Article IV cessions"); then the Court permitted Article IV cessions to be accompanied by any conditions desired by the states; last, it determined that Enclave Clause cessions could similarly be qualified by state conditions.[82]

Prior to *James v. Dravo Contracting Co.*, it had been established that when the federal government acquired property in some way other than a purchase with state consent, the state could subsequently cede jurisdiction with reservations. In *Dravo Contracting*, the Court recognized that "[t]he result to the federal government is the same whether consent is refused and cession is qualified by a reservation of concurrent jurisdiction, or consent to the acquisition is granted with a like qualification."[83] However, as David Engdahl has pointed out, shortly before *Dravo Contracting* the Court had reaffirmed the view that qualifications to a state's cession or consent could not validly be made under the Enclave Clause (even though they could be made in Article IV cessions).[84] Thus, the common sense reasoning in *Dravo Contracting* created a rather sudden change in Enclave Clause interpretation.[85]

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[81] James v. Dravo Contracting Co., 302 U.S. 134, 148-49 (1937). As the Supreme Court pointed out, permitting such restrictions could serve both state *and* federal purposes. *Id.* at 148 (concluding that there is "no reason why the United States should be compelled to accept exclusive jurisdiction or the state be compelled to grant it in giving its consent to purchases"); Silas Mason Co. v. Tax Comm'n, 302 U.S. 186, 208 (1937) (mere fact that federal government needs land "does not necessitate the assumption by the Government of the burdens incident to an exclusive jurisdiction").

For a detailed history of the development of Enclave Clause case law, see David E. Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283 (1976).

[82] *Id.* at 304-06, 321-24, 331. *Compare Cornell*, 25 F. Cas 646, *and* Fort Leavenworth R.R., 114 U.S. at 532 (supporting proposition that Enclave Clause cessions are absolute), *with Dravo Contracting*, 302 U.S. at 148-49 (holding that the Enclave Clause does not require that state consent be without reservations, and concluding that there is "no reason why the United States should be compelled to accept exclusive jurisdiction or the state be compelled to grant it in giving its consent to purchases.").

[83] *Dravo Contracting*, 302 U.S. at 147-48.

Speaking more broadly in *Dravo Contracting*, the Supreme Court elaborated on state authority to impose qualifications upon its consent under the Enclave Clause:

> Clause 17 contains no express stipulation that the consent of the state must be without reservations. We think that such a stipulation should not be implied. We are unable to reconcile such an implication with the freedom of the state and its admitted authority to refuse or qualify cessions of jurisdiction when purchases have been made without consent, or property has been acquired by condemnation.[86]

As shown by the discussion in the following section, the twentieth-century shift from the dominant nineteenth-century judicial view (and the roots of the latter can be heard in Attorney General Randolph's apprehension when the Montauk cession issue reached him in 1793) actually appears to be a return to the solutions worked out in practice by the late eighteenth-century federal and state governments. But neither Congress nor the Executive branch expressly resolved the matter in the 1790s, coming no closer than the March 1795 statute to addressing constitutional issues in handling other conditions imposed (or attempted to be imposed) by the states in ceding lighthouse lands.

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[84] *See* Engdahl, *supra* note 81, at 322 (citing Surplus Trading Co. v. Cook, 281 U.S. 647 (1930) and United States v. Unzeuta, 281 U.S. 138 (1930)).

[85] The change in thinking was significant enough to result in a Congressional redefinition of federal jurisdiction under Title 18. Whereas jurisdiction over crimes on federal lands previously extended only to places of "exclusive" jurisdiction, a 1940 amendment expanded Title 18's reach to places of "concurrent" jurisdiction as well. *See* United States v. Bin Laden, 92 F. Supp. 2d 189, 208-11 (S.D.N.Y. 2000) (setting out history of Enclave Clause judicial interpretation and amendments to Title 18).

[86] *Dravo Contracting*, 302 U.S. at 148-49.

B. Conditioning the Terms of Consent

A number of states imposed time or use restrictions on the effectiveness of their consent. In the case of existing lighthouses, some states conditioned their grant of jurisdiction on the United States' continued operation of the lights, providing that if the lights fell into disrepair, the cessions were to be deemed void.[87] Similarly, in situations where states were ceding properties upon which lighthouses were to be constructed, they placed a time limit upon the federal government's construction work—if the lighthouse was not built within the given time period, the cession would be void.[88]

Not only were the "use" restrictions purporting to govern existing lighthouses received with silence,[89] but—more significantly—the time limitations for construction of new lighthouses were taken quite seriously by the executive branch. In fact, the Treasury Department asked North Carolina for a new cession law after it had failed to get the Cape Hatteras light erected by the state-mandated deadline.[90]

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[87] Rhode Island Act of May 1793, May 1793 R.I. Acts & Resolves 21; Massachusetts Act of June 10, 1790, Mass. Acts, ch. 4. South Carolina and Georgia similarly included provisos conditioning their grants on continued support and repair of the lights, though without explicitly providing that the remedy for breach would be a voiding of the consent. Georgia Act of Dec. 15, 1791, Ga. Acts 17; South Carolina Act of Jan. 20, 1790, S.C. Acts 14.

[88] Virginia Act of Nov. 19, 1789, Va. Acts, ch. 5 (seven years to erect light at Cape Henry); Massachusetts Act of Feb. 19, 1794, Mass. Acts, ch. 10 (four years to erect light on Seguin Island); North Carolina Act of July 1794, N.C. Acts, ch. 1 (3 years to erect light at Cape Hatteras). Virginia and Massachusetts also included a post-construction "use" limitation on their consent, stipulating that the cession would become void if, after construction, the lights were to be allowed to fall into disrepair; Virginia's cession, however, would only become void if the disrepair itself continued for seven years. Virginia Act of Nov. 19, 1789, Va. Acts, ch. 5; Massachusetts Act of Feb. 19, 1794, Mass. Acts, ch. 10

[89] In 1793, Coxe reviewed the Massachussetts cession law from three years earlier and expressed an objection only to a different part of the law. Letter from Tench Coxe to Alexander Hamilton (Jan. 19, 1793), *in* 13 Syrett 503.

Years later, when South Carolina ceded land for creation of a new lighthouse in the Georgetown harbor, the federal government took exception to the cession because it contained a number of conditions. Though not focused on specifically in the government's objection, one of the conditions in the cession was a "use" restriction.

[90] Letter from Tench Coxe to Senators and Representatives of N.C. in Con-

Had the states not limited their cession laws with time or use restrictions, could they subsequently have sought in court to void their previously-given consent? Including the restrictions eliminated uncertainty and provided states with a remedy if the federal government failed to fulfill the purposes (as defined by the state) for which the land had been ceded. In essence, the states were imposing the conditions upon which their consent would be rendered void. And the federal government accepted the states' ability to do that. Did the Constitution require—or even permit—it to do so?

The general history of precedent involving restrictions on exclusive jurisdiction has been outlined above.[91] In its 1937 *Dravo Contracting* opinion, the Supreme Court ultimately upheld the constitutionality of a state law containing a jurisdiction "reverter" clause as similar to the clauses in the 18th century state lighthouse-related laws.[92] On the other hand, where the state is silent and does not impose either an explicit reverter of jurisdiction or a condition based on how the land is to be

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gress (July 20, 1797), *microformed on* M63 (Nat'l Archives & Records Admin.) (stating that the cession was rendered null and void because the time-limit expired, and asking the favor of procuring a new cession with the same terms as before "except the limitation").

Years before, President Washington had conveyed to Congress an earlier North Carolina statute that conveyed title and jurisdiction of land on Occacock [Ocracoke] Island and Cape Island [Cape Fear]. Letter from George Washington to The Senate and House of Representatives (Oct. 27, 1791), *reprinted in* 31 THE WRITINGS OF GEORGE WASHINGTON 406 (John C. Fitzpatrick ed. 1939) Included with the legislation were the original conveyances of land that North Carolina had previously received from the land's owners at the time that North Carolina was planning its own lighthouses. *Id.* In transmitting these documents to Congress, Washington specifically drew Congress' attention to the conditions in the original conveyances that required the lights to be built before October 8, 1800 (Cape Fear) and January 1, 1801 (Ocracoke). *Id.* at 407. Washington to The Senate and The House of Represenatives, Oct. 27, 1791, reprinted in The Writings of George Washington, vol. 31, at 406-07 (1939).

[91] *See supra* note 89.

[92] James v. Dravo Contracting Co., 302 U.S. 134, 148-49 (1937). Among other conditions, the state law in *Dravo Contracting* provided that the jurisdiction ceded "is to cease if the United States fails for five consecutive years to use any such land for the purposes of the grant." *Id.* at 144-45. The Court rejected a claim, based on the *Cornell* and *Fort Leavenworth R.R.* cases, that the state's qualifications on its consent were inoperative under the Enclave Clause. *Id.* at 146-47.

used, the use of federal land for unintended purposes does not divest the federal government of exclusive jurisdiction under the Enclave Clause.[93] Thus, reverter clauses are not superfluous; they do indeed constitute a permissible limitation of the federal government's authority over ceded enclaves.

The complex Article I and Article IV doctrinal maneuvers required for the Supreme Court to end up where it did in 1937 could hardly have been obvious in the 1790s. And yet, the federal officials in charge of the lighthouse program appear to have understood intuitively what the Supreme Court expressed over 140 years later: the power to give or withhold consent provides political leverage to which practicalities might dictate yielding.

It is difficult to imagine the executive branch in the 1790s standing on constitutional principle in seeking to override a state's attempt to insure that the federal government use ceded land for its intended purposes and in a timely manner. Telling a state in 1794 that the Constitution prohibited it from ensuring that the federal government would timely use ceded land to build and maintain a lighthouse (as promised) could have been just as difficult as telling a state that the Constitution did not permit state agents to enter federal land to arrest fugitives from justice. Given the potential for an easy solution to any problem that might arise (did the Treasury Department actually fear that North Carolina would not extend the time for building a lighthouse?), adherence to the state-imposed condition was likely a safe option (as it turned out to be).

In any event, this much is clear: the flexible approach taken by the federal government outpaced the development of the law in the courts. At the very beginning of the federal-state relationship under the constitutional experiment, the Executive Branch ceded more authority to the states under the Enclave Clause than the judiciary of the day might have required.

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[93] *See* Humble Pipe Line Co. v. W.E. Waggonner, 376 U.S. 369, 372-73 (1964), and cases cited therein; *see also* United States v. D.K. Johnson, 994 F.2d 980, 986 (2d Cir. 1993) (state can—but did not—condition continued jurisdiction upon use of land for specified purposes; grant of jurisdiction should be interpreted broadly, because the government's "needs change and, jurisdiction ceded to the United States should not revert to the state merely because the function of ceded property evolves over time"); United States v. Redstone, 488 F.2d 300, 302 (8th Cir. 1973) (fact that ceded land was no longer used for military purposes was irrelevant to determination of federal jurisdiction); United States v. Heard, 270 F. Supp. 198, 200-01 (W.D. Mo. 1967) (if cession is made conditional only for certain purposes, then jurisdiction reverts if reason for condition is terminated).

C. *States Seeking A "Quid Pro Quo" In Return For Consent To Exclusive Jurisdiction*

States were not blind to the bargaining possibility presented by the federal government's need for consent. However, the overwhelming practice was *not* to engage in such bargaining. This is probably because states did not want the responsibility of caring for lighthouses without tonnage duties, or because they did not want to lose new lighthouse construction projects. In the two instances in which states sought to receive "extras" in exchange for their initial cessions under the Lighthouse Act, the results were mixed: South Carolina did not get what it wanted; Georgia did, but it may well have obtained the benefit it was seeking anyway.

Years before passage of the Tonnage Act, a Georgia statute had established a three-pence per ton duty on all shipping entering the port of Savannah, for the purpose of clearing the river. In March 1790, Representative James Jackson unsuccessfully moved to have the appropriations bill include amounts for cleaning up obstructions in the Savannah River.[94] Later in the session, however, Congress assented (for a limited time) to Georgia's continued levying of the tonnage for river clean-up.[95] When Georgia eventually ceded its light house on Tybee Island, it included a proviso "[t]hat the act allowing three pence per ton for clearing and removing wrecks and other obstructions in the River Savannah, be continued until the same shall be completely cleared."[96]

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[94] 2 Annals of Cong. 1499 (1790). Representative Bland feared the precedent that such an appropriation would set: "Should this be granted, every member in this House will come forward with proposals for clearing rivers, and opening canals to the sources of rivers." *Id.* at 1500.

[95] 2 Annals of Cong. 2364, 2365 (1790). The act also included consent for similar tonnage-funded activities established by Rhode Island and Maryland. *Id.* at 2364-65.

Hamilton objected to the proviso, but only on "separation of powers" principles—he informed Georgia's congressional delegation that as an executive officer, he could not accept Georgia's deed of conveyance because "it would carry a clear tho implied engagement for the continuance of a Law, which it is in the power of the Legislature alone to make."[97] Indeed, Congress did end up extending the force of its law well into the 19th century—but it did so without language matching the proviso in Georgia's law of cession and in similar laws benefiting two other states.[98] Regardless of the fact that one cannot firmly attribute Congress' actions to Georgia's linkage of its demand to the issue of jurisdictional cession, the important point is that Hamilton did not object in principle to such linkage. If a state wanted to receive some benefit from Congress in return for consenting to exclusive federal jurisdiction over an enclave, Hamilton's only concern was that the bargain be struck by the legislative branch, and not the executive.[99]

On the other hand, South Carolina's experience amply demonstrates that the power to bargain is not the same thing as "bargaining power." In ceding the Charleston lighthouse to the United States, South Carolina conditioned its cession with a proviso that the federal government pay any lighthouse expenses incurred prior to the August 15, 1789, date established by the Lighthouse Act, which had not yet been paid by the state.[100] Rather than resting on legislative fiat, South

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[96] Georgia Act of Dec. 15, 1791, 1791 Ga. Laws 17.

[97] Letter from Alexander Hamilton to the Senators and Representatives of Georgia (Nov. 17, 1792), *in* 13 Syrett 155-56.

[98] In March 1792, eight months before Hamilton wrote his November 1792 letter, Congress had already enacted a three-year extension of its consent (after having enacted a one-year extension in February 1791). 2 Annals of Cong. 454 (1792). After that, Congressional approval to the Georgia, Maryland, and Rhode Island laws was again extended in 1796, and consent to the Georgia and Maryland acts was further extended by laws passed in 1800, 1808, 1814, and 1822.

[99] Georgia never amended its December 1791 cession law. In March 1793, after Hamilton had expressed an inability to accept Georgia's deed, Georgia's senators presented the deed directly to the Senate, which ordered that the deed lie on file. U.S. Senate Journal, 2nd Cong., 2nd Sess., 503 (1793).

[100] South Carolina Act of Jan. 20, 1790, 1790 S.C. Laws 13, 13-14.

Carolina's William Smith moved to amend the appropriations bill to include a clause paying for such expenses.[101] However, South Carolina's motion was defeated, with objectors standing both on principle (against federal payment of state arrearages) and on claims of "chutzpah"—Representative Fitzsimons declaring Smith and (fellow South Carolinian) Tucker's concern over approximately $2,000 in expenses to be an "inconsiderable object," particularly "coming from a State, which the United States have agreed to pay five millions of dollars for."[102] South Carolina let the small matter drop, and the federal government did not accede to the state's attempt to unilaterally obtain consideration via the "proviso" clause.

The federal government appears to have similarly ignored, albeit with silence, a separate proviso in the same law requiring it to place proper leading marks and buoys near the lighthouse being ceded.[103] However, seven years later, when South Carolina ceded jurisdiction over land intended for construction of a lighthouse in Georgetown harbor, a similar provision did not escape the federal government's notice, and the executive branch called for passage of a new act of cession.

By that time patience with the South Carolina legislature had run thin. Although Congress passed a law providing for erection of the Georgetown light in February 1794, it took more than a year and a half for the legislature to act, and more than two years before Tench Coxe received any word of the cession.[104] As unhappy as Coxe was with the delay, he was even unhappier when he saw that the South Carolina law provided only for conveyance of the soil, and not cession of jurisdiction.[105]

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[101] 2 Annals of Cong. 1498-99 (1790). Smith appears to have been confused, however, in that he moved for expenses arising prior to South Carolina's cession, rather than for expenses arising prior to the Lighthouse Act's August 15, 1789, cutoff date. Under the plain language of the Lighthouse Act, any costs arising between those two dates should have been covered without dispute.

[102] 2 Annals of Cong. 1498 (1790).

[103] South Carolina Act of Jan. 20, 1790, 1790 S.C. Laws 13, 13-14.

[104] Letter from Tench Coxe to William Smith (May 3, 1796), *microformed on* M63, Roll 1 (Nat'l Archives & Records Admin.).

[105] Letter from Tench Coxe to Isaac Holmes (June 15, 1796), *microformed on*

It then took another half year for South Carolina to pass a new law. Their second attempt properly conveyed jurisdiction but contained provisos requiring that the light be kept in good repair and requiring the stationing of leading marks and buoys.[106] This was probably not an unreasonable thing to do, given that the very first law they passed ceding a lighthouse to the federal government in 1790 contained similar provisos.[107] However, this time the federal government did not ignore the provisos.

Secretary of the Treasury Oliver Wolcott sought the opinion of Attorney General Charles Lee, and Lee concluded that South Carolina's conditional grant of jurisdiction did not properly comply with the act of Congress authorizing construction of the Georgetown light.[108] The two concerns Lee noted were that the state consent ought to have been "in general terms" because the federal law requiring the state grant did not specify any qualifications or conditions to be appended to it; and that Congress had not appropriated money for buoys. The latter problem appears to have been the only one that similarly troubled Tench Coxe.[109]

The South Carolina legislature obliged with a third act, containing no limitation other than the reservation for service of process.[110] Given that the state had caused more than a three-year delay in construction of a lighthouse for its own benefit, it was no doubt a wise move for South Carolina to yield—assuming they even cared about the leading marks and buoys and were not simply parroting earlier legislative language. But it is worth noting that nothing in Attorney General Lee's opinion would have precluded them from bargaining with Congress for passage of a law providing for buoys and leading

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M63, Roll 1 (Nat'l Archives & Records Admin.).

[106] South Carolina Act of Dec. 19, 1796, 1796 S.C. Laws 81, 81-82.

[107] South Carolina Act of Jan. 20, 1790, 1790 S.C. Laws 13, 13-14.

[108] Letter from Charles Lee to Oliver Wolcott, Jr. (Jan. 21, 1797), *available at* S.C. Dep't of Archives and History pp. 49-51.

[109] Letter from Tench Coxe to Daniel Stevens (May 11, 1797), *microformed on* M63, Roll 1 (Nat'l Archives & Records Admin.).

[110] South Carolina Act of Dec. 16, 1797, 1797 S.C. Laws 124, 124.

marks. As with Hamilton before him, Lee's concerns appear to have been grounded in considerations of separation of powers and Congressional intent, rather than in Constitutional prohibitions.

In sum, whereas there is clear evidence that the federal government yielded to state concerns over (a) retention of minimal state authority in federal enclaves and (b) failure by the federal government to build the lighthouses for which land had been ceded, no similar evidence exists indicating that the federal government was willing to provide additional consideration to state governments in return for their consent. However, there is no indication that federal officials felt constitutionally constrained in that regard, and engaging in such bargaining would not have constituted wise national policy. So the resolution of the issue was likely a political one. This leads us to the last category of conditions to be examined: conditions on the terms by which the federal government could acquire lighthouse land from private citizens.

D. Terms of Acquisition

Although the Lighthouse Act provided states with an economic benefit in return for ceding their existing lighthouse lands, no purchase money was provided for the land itself. This did not escape the notice of some state legislatures. None of the states insisted on compensation for the land, but a handful did provide that if the United States were to compensate any other state for its ceded lands, then they too were to receive similar compensation.[111] The federal government did not compensate any of the states for their initial lighthouse cessions, and there is no indication of any federal concern over the compensation provisions. But one wonders what might have happened if the federal government had determined that one state was particularly deserving of compensation for their improved land.[112]

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[111] *See* Rhode Island Act of May 1793, 1793 R.I. Laws 21; Massachusetts Act of June 10, 1790, ch. 4, 1790 Mass. Laws 77; New York Act of Feb. 3, 1790, ch. 3.

[112] Technically speaking, the Enclave Clause only provides for exclusive juris-

Would it have considered itself obligated to pay the states that unilaterally imposed conditions of equivalent payment? The answer may indeed be "yes."

The acquisition of the extant lighthouses in 1789 was simplified by the fact that the states themselves (with the possible exception of Rhode Island) owned the lands on which the lighthouses had been built. However, once the federal government started constructing new lighthouses, they found themselves regularly needing to acquire land from private citizens. But just as states donated their lighthouse lands, private donations were not out of the question either, chiefly for two reasons: the barren land that tended to be used for lighthouses was generally not worth much, and landowners often had a vested financial interest in having local navigation improved with the addition of a lighthouse.[113] Although private ownership of new light-

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diction when land is "purchased" by the federal government. U.S. CONST. art. I, § 8, cl. 17. Assuming that a fair interpretation of the word "purchase" does not include obtaining land for free, one could argue that providing a future economic benefit (lighthouse operation) to the former land owner (the state) does not solve the problem. Certainly, the states with conditional compensation clauses did not equate the promised economic benefit of functioning lighthouses with "compensation" for the land. And so, rather than viewing the conditional compensation clauses only as an attempt to impose a condition on the federal government's power, perhaps instead the entire set of state laws governing the cession of lighthouses existing in 1789 should also be viewed as an example of the state legislatures' willingness to reasonably expand upon the Constitution's precise words. Indeed, it would make little sense to read the Enclave Clause as protecting a state from determining to consensually give some of its land, together with a cession of jurisdiction, to the federal government for free. *See* Humble Pipe Line Co. v. W.E. Waggonner, 376 U.S. 369, 371-72 (1964) (rejecting argument that the Enclave Clause does not apply because land was donated by state, and thus not "purchased").

[113] Numerous letters of the Commissioner of Revenue (the Treasury Department official whose job included overseeing the lighthouse establishment) discuss the possibility of acquiring land by donation. The following passage, from a May 1795 letter to the supervisor of lighthouses in New York, is typical: "The lots for these purposes are generally given to the United States, on account of the incidental benefits to the adjacent ports and country; or from consideration of Public Spirit, or from the poverty of the soil." Letter from Tench Coxe to Nicholas Fish (May 26, 1795), *microformed on* M63, Roll 1 (Nat'l Archives & Records Admin.). *See also* Tench Coxe to Pinchman, William Gray, Jr., and Jno Dary (May 19, 1796), *microformed on* M63 (Nat'l Archives & Records Admin.) (lighthouse lands usually given freely, "yet an instance of a purchase has occurred, the soil being

house lands did result in the government having to pay out sums for land acquisition, gifts did occur, and the Treasury Department customarily had its representatives explore the option.[114]

In 1798, shortly after Congress authorized erection of a lighthouse at Eaton's Neck, New York, Commissioner of Revenue William Miller (Tench Coxe's successor) wrote two letters to his employees regarding acquisition of the land by gift or purchase.[115] In the meantime, though, New York had passed a statute ceding its jurisdiction over whatever land the United States eventually chose for the lighthouse, and provided that such cession would occur as soon as the President furnished a certificate describing the land chosen and "certifying that the same are purchased of the present proprietor thereof."[116] Once Miller read the statute, he interpreted the quoted sentence as a condition of acquisition, writing both to his agent in New York and to the Secretary of the Treasury that the New York law required that the land be purchased.[117]

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very valuable"); Tench Coxe to Benjamin Lincoln (July 8, 1796), *microformed on* M63, Roll 1 (Nat'l Archives & Records Admin.); Tench Coxe to S. Tredwell (Sept. 27, 1797), *microformed on* M63 (Nat'l Archives & Records Admin.).

[114] The land for the lighthouse at Georgetown, South Carolina, was donated, and prior to the federal government's involvement land was donated to the state of North Carolina for lighthouses at Cape Fear and Ocracoke. South Carolina Act of Dec. 12, 1795, 1795 S.C. Acts 8; North Carolina Act of Nov. 1, 1790, ch. 2, 1790 Sess. Laws 484; Letter from Tench Coxe to S. Tredwell (Sept. 27, 1797), *microformed on* M63 (Nat'l Archives & Records Admin.); Letter from William Miller, Commissioner of Revenue, to Alexander Hamilton, Secretary of Treasury (Sept. 25, 1798), *microformed on* M63 (Nat'l Archives & Records Admin.). On the other hand, the number of lighthouse properties eventually purchased over the years suggests that Coxe may have overstated the frequency with which gifts could be expected, in an attempt to keep his agents from spending too much for the land the government needed.

[115] Act of Mar. 14, 1798, ch. 16, 1 Stat. 540; Letter from William Miller, Commissioner of Revenue, to Joshua Sands (Apr. 28, 1798), *microformed on* M63 (Nat'l Archives & Records Admin.) ("Can the quantity of ground necessary be obtained by gift or purchase, if not by the former at what price—"); Letter from William Miller, Commissioner of Revenue, to S. Tredwell (May 31, 1798), *microformed on* M63 (Nat'l Archives & Records Admin.) (ordering that the land be obtained by gift or purchase).

[116] New York Act of Apr. 6, 1798, ch. 112, 1798 N.Y. Laws 294.

[117] In his June 6, 1798, letter to Joshua Sands, Miller included a copy of New

In short, Miller was willing to accept as a condition of a state's grant of jurisdiction a limitation upon the terms by which the federal government could acquire property. Although the episode specifically concerned federal receipt of a voluntary transfer of private property, it also illustrates the practical limitations on the federal government's eminent domain power.

Decades later, the Supreme Court affirmed that the federal government's right to exercise the power of eminent domain could never be subject to state consent.[118] However, as Enclave Clause law developed, the courts recognized the power of a state to withhold or qualify a cession of jurisdiction over lands obtained by the federal government through condemnation.[119] Thus, although states have no right to interfere with the exercise of federal takings power, the practical effect of the Enclave Clause means that if the federal government wants "exclusive" jurisdiction, it would have to comply with a state

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York's cession of jurisdiction and explained that "In the case of the proposed Light-house at Eaton's Neck it is necessary that a purchase should be made from the present proprietor of the ground which is chosen." Letter from William Miller, Commissioner of Revenue, to Joshua Sands (June 6, 1798), *microformed on* M63 (Nat'l Archives & Records Admin.). Once the deal was struck, he sent the deed to the Treasury Secretary, together with a copy of New York's statute, and an explanation that the New York statute included a condition "that purchase is made of the proprietor." It is entirely possible that the State of New York did not intend by its words to rule out the possibility of a gift, but Miller, whose prior correspondence had distinguished between the two methods of acquisition, apparently took the words as he literally understood them. *Cf.* North Carolina Act of July 18, 1794, ch. 1, 1794 N.C. Sess. Laws 52 (providing that exclusive jurisdiction over land intended for lighthouses and forts shall be "ceded and stand vested" in the United States "as soon as the proprietors of said lands shall convey the same to the United States."). And it is also possible that Miller was being too technical in his reading, and interpreted the statute more narrowly than necessary. The point, however, is that having read the law as containing a condition, he sought to comply with that condition.

[118] Kohl v. United States, 91 U.S. 367, 372-74 (1876). The Court did not have any reason to wrestle with the implications of its own suggestion that "[s]uch consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired." *Id.* at 374.

[119] James v. Dravo Contracting Co., 302 U.S. 134, 148-49 (1937). *See also Ex parte* Hebard, 11 F. Cas. 1010, 1011 (D. Kan. 1877) (No. 6312) (stating that consent required by the Constitution only makes sense as a limitation on the federal government's acquisition of plenary jurisdiction, rather than on its right of eminent domain).

prohibition (or qualification) of that power.[120]

The executive branch came face to face with this reality long before it was sorted out in the courts.[121] Though the implications of state power under the Enclave Clause were far from ironed out in the practices of the 1790s, their seeds were planted in the early practices under the Lighthouse Act.

CONCLUSION

As the Supreme Court stated in 1937: "We have frequently said that our system of government is a practical adjustment by which the national authority may be maintained in its full scope without unnecessary loss of local efficiency."[122] One of the first "practical adjustments" that needed to be worked out under the Constitution was the acquisition and treatment of federal lands—lands situated within state borders but needed for federal operations. Some of the very first parcels obtained were the lighthouses that were put in federal control at the very beginning of the First Federal Congress. Working out the practical adjustments pertaining to acquisition of those parcels led to the first federal legislative gloss on the Constitution's Enclave Clause.

But operating mostly without legislative or judicial pronouncements, the early federal administration worked out its own adjustments with states that sought to place conditions upon jurisdictional cessions over federal enclaves. Some of those adjustments evince a flexibility of constitutional interpretation that would not be seen in Enclave Clause jurisprudence until the twentieth century. All of them reflect a search for common ground over dual control the federal and state governments had regarding establishment of federal jurisdiction within state boundaries. Whether or not the political decisions made square with a strict reading of the Enclave Clause, it is difficult to quibble with their wisdom.

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[120] This represents a practical limitation on the Supreme Court's pronouncement that the strength of the eminent domain power lies in the federal government's ability to use it to avoid an attempt by an individual or a state legislature to attach "harassing conditions" to federal acquisition of property. United States v. Fox, 94 U.S. 315, 321 (1877) (upholding against federal challenge a New York law providing that land in New York could only be devised to natural persons and to corporations expressly authorized by New York).

[121] *See also* Grace, *supra* note 3, at 143-44, 147.

[122] Silas Mason Co. v. Tax Comm'n, 302 U.S. 186, 208 (1937).

COMMENT

SECURE FLIGHT AND DATAVEILLANCE, A NEW TYPE OF CIVIL LIBERTIES EROSION: STRIPPING YOUR RIGHTS WHEN YOU DON'T EVEN KNOW IT[*]

Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.[1]

At what point does the cost to civil liberties from legislation designed to prevent terrorism outweigh the added security that the legislation provides?[2]

INTRODUCTION

For the first time since December 7, 1941, a significant event occurred on home soil, forcing America once again to realize its integral relationship with the world community. On September 11, 2001, nineteen terrorists managed to board domestic commercial aircraft despite the current security measures, flying two planes into the World Trade Center causing its eventual collapse and killing approximately 2800 people.[3] The hijackers crashed a third plane into the heart of America's military, The Pentagon, killing another 184 people and injuring dozens more.[4] Yet another plane was crashed into the quiet Pennsylvania countryside killing forty more. Even as this comment is written, victims have yet to be identified and loved ones remain missing. Unknown to most Americans, the hijackers had been identified as flight risks that very day by airport security but were allowed to board their planes.[5] In response to the tragedy, Congress embarked upon a course of action which will change the face of liberty for years to come.

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[*] Outstanding Comment Award presented by Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.

[1] Benjamin Franklin, Pennsylvania Assembly: Reply to the Governor, Nov. 11, 1755, *in* 6 The Papers of Benjamin Franklin 242 (Leonard W. Labaree ed., 1963). This same inscription is located on the base pedestal of the Statute of Liberty.

[2] Linda Greenhouse, *A Nation Challenged: The Supreme Court: In New York Visit, O'Connor Foresees Limits on Freedom*, N.Y. Times, Sept. 29, 2001, at B5.

America's fear of terrorism had arrived on its doorstep and embedded itself in the mind of every citizen.[6] Terrorism uses an entirely different psychology than war. The goal of war is to kill thousands to change the position of the few; terrorism kills in small numbers to frighten millions.[7] Once a person's routine becomes the source of uncertainty, they will change their routine in an attempt to re-establish order and control.

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[3] The exact number of lives lost at the world trade center is unknown. *See* Rebecca Blackmon Joyner, Note, *An Old Law for New World? Third-Party Liability for Terrorists Acts—From the Klan to Al Qaeda*, 72 FORDAM L. REV. 427, 461 n.281 (2003); Leigh A. Kite, Note, *Red Flagging Civil Liberties and Due Process Rights of Airline Passengers: Will A Redesigned CAPPS II System Meet the Constitutional Challenge?*, 61 WASH. & LEE L. REV. 1385, 1387 (2004).

[4] *See generally* Phil Hirschkorn, *New York Adjusts Terrorist Death Toll Downward*, *available at* http://www.cnn.com/2002/US/08/22/911.toll (referencing death toll at attack sites) (last visited Mar. 3, 2005). Analysts have suggested that the fourth plane also targeted the Pentagon but passengers or crew may have managed to thwart the hijacker's efforts, thereby preventing more deaths. *Id.*

[5] The pilot program of CAPPS I correctly identified nine of the nineteen would-be-hijackers as threat risks but no legislation was in place whereby passengers could be refused boarding if identified by the CAPPS I system. *House Select Comm. on Homeland Sec.: Subcomm. on Econ. Sec., Infrastructure Prot. & Cybersecurity Hearing on Air Passenger Pre-Screening,* 109th Cong. (June 29, 2005) (statement of James Dempsey, Exec. Dir., Ctr. for Democracy & Tech.); Kite, *supra* note 3, at 1387-88.

[6] *See* 147 CONG. REC. S9583 (daily ed. Sept. 21, 2001) (senate report announcing that security of airports is a matter of national security).

[7] *See generally* U.S. MARINE CORPS, MARINE CORPS RECRUIT DEPOT HANDBOOK: TERRORISM AWARENESS 134-38 (2000); BLACK'S LAW Dictionary 1512-12 (8th ed. 1999); U.S. MARINE CORPS, WARFIGHTING 3, 4 (1997); Guy M. Lee, Ethical

Attempts to find order amongst chaos have led America to some of its darkest hours. Rampant fear has unfortunately flourished into the erosion of civil liberties.[8] For example, during the Civil War, writ of habeas corpus was suspended. During World War I, restrictions approved by the courts drastically limited freedom of expression.[9] During World War II, thousands of Japanese Americans were interned because of their nationality and yet the nation didn't learn its lesson because during the 1960's our government set out to discredit and destroy anyone with communist ties.[10] Apparently, history has not been America's teacher. Our country is once again at the cross-roads and leaning toward the well-worn path toward the erosion of civil liberties.

Not surprisingly, after September 11th, legislation was passed which began eroding our civil liberties.[11] The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT ACT) has authorized intrusive surveillance and data reconnaissance which targets citizens and visitors alike.[12] Remembering past wrongs and cautioning against any further civil liberty erosion, Senator Russ Feingold said, "We will lose [the war on terrorism] without a shot being fired

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Considerations for Islamic Insurgency Movements: A Case Study of the Algerian Civil War, 1992-1998 16 (2001) (on file with Marine Corps Command and Staff College).

[8] DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003); Alan Brinkley, *A Familiar Story: Lessons from Past Assaults on Freedoms*, *in* THE WAR ON OUR FREEDOMS 23 (Richard C. Leone & Greg Anrig, Jr., eds., 2003); Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455 (2003); Kite, *supra* note 3, at 1387.

[9] *E.g.*, COLE, *supra* note 8; Wood, *supra* note 8; Kite, *supra* note 3, at 1389.

[10] COLE, *supra* note 8.

[11] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56 (2001), 115 Stat. 272 [hereinafter USA PATRIOT ACT].

[12] *Id.*

if we [begin] sacrific[ing] the liberties of the American people in the belief that by doing so we will stop the terrorists."[13] Senator Feingold's cry fell on deaf ears as America plunged once again into rash action.

Congress proceeded down the path where national security is once again placed before fundamental rights.[14] Congress' passage of the Aviation and Transportation Security Act (ATSA)[15] and the Air Transportation Safety and System Stabilization Act (ATSSSA)[16] both sought to federalize many services and personnel previously exclusively private.[17] While neither the ATSA nor ATSSSA overtly erode civil liberties, CAPPS,[18] CAPPS II and Secure Flight do.[19] Because of staunch opposition, CAPPS II was not implemented by the Transportation Security Administration (TSA). However, a revised version known as Secure Flight was scheduled for full implementation in the fall of 2005.[20]

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[13] 147 CONG. REC. S10, 570 (daily ed. Oct. 11, 2001) (statement by Sen. Feingold while discussing the USA PATRIOT ACT). No doubt many of the legislation's opponents feared appearing *un*patriotic by voting against the USA PATRIOT ACT during one of America's darkest hours.

[14] Kevin Bankston & Megan E. Gray, *Government Surveillance and Data Privacy Issues: Foundations and Developments*, PRIVACY & INFO L. REP., Apr. 2003, at 1, 3 (arguing that with little to no regard for the disastrous impact on civil liberties, the legislature passed the USA PATRIOT ACT with almost no debate). The USA PATRIOT ACT greatly expands the government's ability to spy upon its own citizens unchecked while weakening oversight which could prevent future abuses. *Id.*; Kite, *supra* note 3, at 1386 n.21. The USA PATRIOT ACT enables far-reaching invasion of privacy and monitoring of citizens and suspected terrorists including but not limited to planting surveillance devices on electronics and computers and amassing computer databases containing sensitive private information. NAT HENTOFF, THE WAR ON THE BILL OF RIGHTS AND THE GATHERING RESISTANCE (2003); Kite, *supra* note 3, at 1387 n.21.

[15] Aviation and Transportation Security Act, Pub. L. No. 107-71 (2001) [hereinafter ATSA].

[16] Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42 (2001) [hereinafter ATSSSA].

[17] *See generally* David T. Norton, *Recent Developments in Aviation Law*, 67 J. AIR L. & COM. 1107 (2002).

[18] Computer-Assisted Passenger Prescreening System (CAPPS) was developed by Northwest Airlines with a grant from the Federal Aviation Administration (FAA) as a passenger profiling security mechanism for aviation. Charu A. Chandrasekhar, Comment, *Flying While Brown: Federal Civil Rights Remedies to Post—9/11 Airline Racial Profiling of South Asians*, 10 ASIAN L.J. 215, 221 (2003).

[19] Computer-Assisted Passenger Prescreening System II (CAPPS II) was an improved system developed by the TSA based on the original platforms of CAPS and CAPPS. *Id.* at 223. CAPS and CAPPS were replaced by the more advanced CAPPS II. *Id.* CAPPS II was subsequently replaced by Secure Flight. *Id.*

This comment will provide a brief history of CAPS, CAPPS, CAPPS II and Secure Flight and their application in passenger surveillance. Part II will then discuss datamining and information utilization. Part III discusses the constitutional issues of civil liberty infringement for those traveling domestically and internationally. Part IV discusses the redress procedures used by Secure Flight for those flagged during the check-in process. Part V discusses the current balancing test to determine whether civil liberty infringement is justified. Part VI suggests possible solutions and addresses the need for diligence in keeping our airways safe while not stripping Americans of their fundamental rights.

I. A BRIEF HISTORY OF COMPUTER AUTOMATED PASSENGER SURVEILLANCE

A. *Computer-Assisted Passenger Prescreening System (CAPPS)*

After TWA Flight 800's crash in 1996, the government formed the Gore Commission which recommended several suggestions to the aviation industry which would enhance their security systems and make flying safer.[21] The Gore Commission used this platform to conceptualize CAPS and CAPPS.[22] CAPPS was originally developed by Northwest Airlines in conjunction with the FAA to integrate the abilities of a computer with available information systems to address the growing concern over aviation safety.[23] The FAA then modified CAPS into the Computer-Assisted Passenger *Pre*-screening System (CAPPS) which they offered on a volunteer basis to all major airlines for implementation.[24] CAPPS utilized approximately forty pieces of personalized passenger data, retained in secrecy, to identify passengers who fit a "profile" based on previously determined criteria.[25] These data probably included the passenger's address, method of ticket purchase, travel companions, rental status, ticket purchase date, departure date, destination, origin and whether the ticket was one way or round trip.[26] The Gore Commission maintained that no religious or racial data would be contained in the database; but according to Chardrasekhar, Asian advocacy groups have noted that the CAPPS profiling system unfairly targeted them as "increased risk" because of their national and racial identity.[27] Unfortunately, the CAPPS system and its data components were never released before the system was taken offline.[28]

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[20] James X. Dempsey & Lara M. Flint, *The Future of Internet Surveillance Law: A Symposium to Discuss Internet Surveillance, Privacy & The USA Patriot Act: Surveillance, Records & Computers: Commercial Data and National Security*, 72 GEO. WASH. L. REV. 1459, 1467 (2004).

[21] Chandrasekhar, *supra* note 18, at 221.

[22] White House Commission on Aviation Safety and Security, Final Report to Pres. Clinton (1997), *available at* http://www.fas.org/irp/threat/212fin~1.html (last visited Jan. 13, 2006) [hereinafter Gore Commission].

B. Computer-Assisted Passenger Prescreening System—Redux (CAPPS II)

Shortly after September 11th, the ATSA mandated the creation, under Section 136, of an improved version of CAPPS to be implemented at all airports in the United States and foreign hubs which service inbound flights to America.[29] CAPPS II had been tested in several airports but heavy resistance precluded its originally scheduled implementation at the end of 2004.[30] CAPPS II, as originally conceived, evaluated all incoming passengers utilizing a process whereby the person's identification was matched with a government-linked commercial database to provide a computer generated risk assessment.[31] Civil liberty advocates challenged CAPPS II claiming it treated all incoming passengers as potential terrorists while privacy groups vehemently opposed the use of private information being used against would-be passengers.[32]

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[23] *Id.*

[24] Chandrasekhar, *supra* note 18, at 221.

[25] Michael J. AuBuchon, Comment, *Choosing How Safe is Enough: Increased Antiterrorist Federal Activity And Its Effect On The General Public And The Airport/Airline Industry*, 64 J. AIR L. & COM. 891, 903 (1999).

[26] Chandrasekhar, *supra* note 18, at 221 (citing Air Passenger Profiling: Hearings Before the Aviation Subcomm. of the House Comm. on Transp. and Infrastructure, 107th Cong. (2002)).

[27] Chandrasekhar, *supra* note 18, at 221. *See generally* Jamie L. Rhee, Comment, *Rational and Constitutional Approaches To Airline Safety In The Face of Terrorist Threats*, 49 DEPAUL L. REV. 847 (2000).

[28] Rhee, *supra* note 27, at 865.

[29] Kite, *supra* note 3, at 1387.

With CAPPS II, passengers would have been coded one of three ways upon arriving at the airport. (1) Green, meaning "not *un*trustworthy" or the passenger had been identified as possessing limited risk behavior, making them eligible to board the aircraft. (2) Yellow, because the passenger is "potentially untrustworthy" or they *may be* a risk, further investigation is required wherein, depending on the outcome of the investigation, either they would be allowed to board the aircraft or precluded from flying. (3) Red denoted the passenger is "untrustworthy" and therefore a risk to the aircraft, wherein law enforcement would be notified and the person would be detained or arrested.[33]

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[30] *See* Press Release, U.S. Dep't of Homeland Security, Undersecretary Hutchinson's Remarks at a CAPPS II Media Roundtable, *available at* http://www.dhs.gov/dhspublic/display?content=3166 (Feb. 13, 2004) (last visited Jan. 13, 2006). Civil liberty organizations strongly opposed CAPPS II because of fears that people would be accidentally detained without actually catching all terrorists. Kite, *supra* note 3, at 1390.

[31] Kite, *supra* note 3, at 1391. *See generally* Notice of Status of System of Records; Interim Final Notice; Request for Further Comments, 68 Fed. Reg. 45, 265 (Aug. 1, 2003).

[32] *See* Kite, *supra* note 3, at 1391-92; Leslie Miller, *New Passenger Screening Plan Not Ready to Fly*, CHI. SUN-TIMES, July 14, 2004, at 46; Matthew L. Wald, *Government Is 'Reshaping' Airport Screening System*, N.Y. TIMES, July 16, 2004, at A18.

[33] K. A. Taipale, *Technology, Security & Privacy: The Fear of Frankenstein, The Mythology of Privacy and the Lessons of King Ludd*, 7 YALE SYMP. L. & TECH. 123, *12 (2005) (explaining further compliations likely to occur because of situations like, "untrustworthy and denied access (and there may be false positives), those deemed not-untrustworthy who are in-fact trustworthy and are allowed access (good guys), and those deemed not-untrustworthy who are in-fact untrustworthy but have not been yet identified as such and may be mistakenly

Due to the opposition levied upon CAPPS II, TSA and the White House revoked the program's implementation and demanded that it be redesigned to accommodate the policy concerns voiced by the opposition. The new system, Secure Flight, incorporates changes, which presumably altered the risk assessment, and addresses pervasive privacy concerns inherent in the CAPPS II system.

C. The New and Improved "Secure Flight"

TSA has announced that Secure Flight, which was originally scheduled to be implemented in the fall of 2005, adequately addresses and incorporates the concerns inherent in CAPPS II. Realistically however, Secure Flight has simply eliminated the yellow classification and removed certain computer-based risk assessment algorithms, mined from vast commercial databases, in its verification process.[34] Secure Flight still uses datamining[35] and computer generated algorithms gleamed from federal databases of known terrorists matched against vast commercial databases of private infor-

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allowed access (false negatives).").

[34] Kite, *supra* note 3, at 1392.

[35] Data mining is the process of compiling and aggregating individual data to be used for computational purposes of personal evaluation. K. A. Taipale and Paul Rosenzweig have identified three distinct applications:

> [F]irst, subject-oriented link analysis, that is, automated analysis to learn more about a particular data subject, their relationships, associations and actions;
> [S]econd, pattern-analysis (or data mining in the narrow sense), that is, automated analysis to develop a descriptive or predictive model based on discovered patterns; and
> [T]hird, pattern-matching, that is, automated analysis using a descriptive or predictive model (whether the model itself is developed through automated analysis or not) against additional datasets to identify other related (or "like") data subjects (people, places, things, relationships, etc.).

K. A. Taipale, *Data Mining and Domestic Security: Connecting the Dots to Make Sense of Data*, 5 COLUM. SCI. & TECH. L. REV. 2 (2003) (noting that these aggregated data and computer analysis systems are tools to aid in human analytical thinking in order to manage and use the vast amounts of information available); Taipale, *supra* note 33, at *13; *see also* Paul Rosenzweig, *Proposals for Implementing the Terrorism Information Awareness System*, 2 GEO. J. L. & PUB. POL'Y 169 (2004).

mation.[36] To understand the importance of Secure Flight's implementation, an analysis of dataveillance and datamining must be undertaken.[37]

II. DATA MINING AND DATAVEILLANCE, A MODERN REINCARNATION OF THE GUMSHOE

A. *Types of Identification Captured*

The types of information captured by datamining, to be used for dataveillance, while complex on its face, is nothing more than an attempt to accurately identify an individual. This identification can be broken down into three basic forms: Entity, Identity and Attribute.[38] Entity resolution is the "process whereby different identifiers or different identities are resolved [] to the same entity or individual usually through analysis of shared attributes."[39] Simply put, it is an evaluation, at a certain confidence level, that the person the computer designates is the same one presenting their I.D.[40]

Identity authentification is the level of confidence that the computer generated "identifier" is in fact the same person it denotes. For example, the computer must determine whether "Bob Jones" is the same person as William Jones or Robert Jones.[41] This identity match can be achieved by implementing technological evaluation methods like passwords, finger print ID, DNA sniffers and retina/iris scanners.[42] Once *entity* and *identity* are assured and the person is properly linked to the information being represented on the computer,[43] attribute analysis must be completed.

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[36] Kite, *supra* note 3, at 1392.

[37] The term dataveillance, also known as pattern analysis or knowledge extraction, is the process of analyzing aggregated data based on p-values dependent upon a desired level of error. Dempsey, *supra* note 20, at 1463. That level of error, known as the β, is based upon a level of significance known as α. *See generally* NETER ET AL., APPLIED LINEAR MODELS (4th ed. 1996) (noting that type I errors are commonly known as α errors and type II errors are known as a β error). That information is then converted into an output based upon a level of confidence to forecast a potential outcome. Taipale, *supra* note 33, at *10. The term "dataveillance," while cleverly combining "surveillance" with "data" analysis is actually more technical than the word suggests. *Id.* Dataveillance uses more than a simple review of data to survey an individual because the amount of data is too vast for an efficient human analysis. *Id.*

[38] Taipale, *supra* note 33, at *10.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 11; Dempsey, *supra* note 20, at 1463.

Attribute authentification is the "process of establishing confidence that an attribute [] applies to a specific entity."[44] Once a person is properly identified, their information needs to be used for something practical like assessing risk.[45] At this point, the ability to compare the entity against a government watch list is only as useful as the watch list, database or intelligence which provided it.[46]

All these data, warehoused by sources which collect it, must be useful but not illegally obtained. While much of the information collected does not amount to a direct invasion of privacy, the aggregation of information for the purpose of examination and extrapolation creates civil liberty concerns. Dataveillance poses constitutional concerns because it raises privacy issues and utilizes *lawful* activities to "presume" future guilt. Jeffrey Rosen capsulated this concern:

> When the government engages in mass dataveillance to conduct general searches of millions of citizens without cause to believe that a crime has been committed, the searches arguably raise the same dangers in the twenty-first century as the general warrants that the [f]ramers of the Fourth Amendment feared in the eighteenth century.[47]

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[42] *House Select Comm. on Homeland Sec.: Subcomm. on Econ. Sec., Infrastructure Prot. & Cybersecurity Hearing on Air Passenger Pre-Screening,* 109th Cong. (June 9, 2005) (statement of Stewart Verdery, Jr., Principal, Mehlman Vogel Castagnetti, Inc.) (stating that he envisions a baseline procedure where registered travelers would use biometric, fingerprint, and biographic information in real time to satisfy identification confirmation); Dempsey, *supra* note 20, at 1463.

[43] *Id.*

[44] Taipale, *supra* note 33, at *11.

[45] *Id.*

[46] *Id. See generally* BRUCE SCHNEIER, BEYOND FEAR 38-40 (2003).

[47] Data Mining: Current Applications and Future Possibilities: Hearing Before the House Subcomm. on Tech., Info. Policy, Intergovernmental Relations, and the

Based on the importance of fundamental rights with respect to citizenship, constitutional concerns will encompass the majority of this comment. Serious constitutional issues arise when (1) privacy rights are violated, (2) guilt is assigned before the crime, or (3) the government creates a pretext screening to circumvent the Fourth Amendment.

B. Dataveillance Background

Due process and Fourth Amendment Issues are at the forefront of using personal data, to create risk assessments without consent, because an individual may be deprived of his or her civil liberties. The federal government, through the Information Analysis and Infrastructure Protection Directorate at the Department of Homeland Security Integration Center, has given the Federal Bureau of Investigation (FBI) the authority to use datamining with private data warehousing companies.[48] This act allows the federal government to circumvent the Privacy and Information Act because it is not a "government database."[49] Current laws allow these commercial databases to be used for investigation of terrorist activities without the hindrance of oversight by applicable privacy laws because they are not *government* databases. Furthermore, privacy laws, which ordinarily give citizens the right to review all information about them, do not apply because the information is privately maintained.[50]

Census, Comm. on Gov't Reform, 108th Cong. (2003) (statement of Jeffrey Rosen, Assoc. Professor, The George Washington Univ. Law Sch.) *cited in* Dempsey, *supra* note 20, at 1465 n.20 [hereinafter Rosen].

[48] *See generally* Glenn R. Simpson, *Big Brother-in-law: If the FBI Hopes to Get the Goods on You, It May Ask ChoicePoint: U.S. Agencies' Growing Use of Outside Data Suppliers Raises Privacy Concerns*, WALL ST. J., Apr. 13, 2001, at A1.

[49] Dempsey, *supra* note 20, at 1469.

[50] *Id.* The USA PATRIOT ACT contains almost no First Amendment safeguards, and Section 203 allows extensive sharing of information which is not related to terrorist activities without regard to whether the information deals with legal or illegal activities. USA PATRIOT ACT, *supra* note 11, at § 203(a); Dempsey, *supra* note 20, at 1483. The USA PATRIOT ACT circumvents grand jury

Government officials have defended their plans and assured privacy groups that their use of the commercial data will be strictly monitored, yet there are no existing programs in place which *can* oversee the government's use of these databases.[51] Moreover, no legislation is in place to control the privately held data, such as the Federal Credit Reporting Act (FCRA), which was intended to protect consumers from disclosure of inaccurate information held by consumer credit agencies.[52] Thus, the private warehouses may dispense harmful errors with impunity to Secure Flight. To make matters worse, the information contained in these commercial databases will be held in absolute secrecy.[53] According to the TSA and the Department of Homeland Security, if this information were released it might allow would-be-terrorists to circumvent the system.[54] Understandably, there are important competing interests between notifying the public and national security, but at what cost should America's safety come to its citizens?[55]

III. CONSTITUTIONAL ISSUES FOR DATAVEILLANCE

A. *Fourth Amendment*

The Fourth Amendment protects citizens from unreasonable searches and seizures.[56] According to Jeffrey Rosen, the framers of the Constitution were instinctively concerned about searches delving into a person's private life.[57] While it is unlikely that the original framers envisioned mass private commercial databases being analyzed by governmental "thinking

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powers with none of the protections which the criminal justice system provides. USA PATRIOT ACT, *supra* note 11, at § 203(a). Moreover, no judicial approval is required for their investigative activities nor does it require disclosure of any of the information used in identifying the individual. *Id.*

[51] Dempsey, *supra* note 20, at 1471; *see, e.g.,* Fair Credit Reporting Act, 15 U.S.C.A. 1681-1691 (West 1998 & Supp. 2003) [hereinafter FCRA].

[52] Dempsey, *supra* note 20, at 1469.

[53] *Id.*; *see also House Select Comm.*, *supra* note 5.

[54] Dempsey, *supra* note 20, at 1489.

[55] *Id.*

[56] U.S. CONST. amend IV.

[57] Rosen, *supra* note 47.

machines," let alone algorithmic risk assessment on an individuals boarding "flying machines," the Fourth Amendment still applies. The Constitution was drafted in a manner to provide for unseen contingencies and technological advances. Now that emerging technologies are being used, the American court system must use its available resources to ensure the framers' intent is respected and that civil liberties are protected.

Professor K.A. Taipale suggests that it is irrational to assume that proactive risk assessment violates the Fourth Amendment.[58] However, Taipale's analysis focuses on an exaggeration rather than the methods of dataveillance.[59] While Taipale's analogy of placing a police officer in a high crime area appears comparable to the proactive investigation of embarking aircraft passengers, the analogy fails to recognize the method invoked.[60] A more accurate analogy would be sending the police to thoroughly review every available personal document in your home, without a warrant, every time you wanted to drive your car. Dataveillance, at its heart, investigates a person who has yet to commit a crime and determines their guilt of a future crime based on past events. While this Orwellian example may seem to exaggerate present dataveillance capabilities, the reality of Secure Flight is not unlike the fictional "thought crime" represented in the post war epic, *1984*.[61]

Granted, a search by itself is not a violation of the Fourth Amendment. If a search is deemed "reasonable," then it falls outside the Fourth Amendment and does not require a warrant from the courts.[62] Likewise, simply because a search is deemed unreasonable does not mean the evidence gathered cannot be used. Congress and the Court have created two methods of redress for individuals who have had their rights violated by unreasonable searches. First, they may file a Section 1983 civil suit against the law enforcement agency which violated their civil rights.[63] Second, if they have been charged in a criminal court they may seek to exclude illegally obtained evidence from the trial.[64] Difficulties beyond the scope of this comment arise once standing[65] or attenuation[66] are analyzed.[67]

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[58] Taipale, *supra* note 33, at *16.

[59] *Id.* (stating "[t]aking this to its logical extreme would mean that any proactive policing strategy to allocate resources, including assigning a police officer to a high crime location, would be unconstitutional if it was not in response to a specific observed behavior relating to a particular crime.").

[60] *Id.*

[61] GEORGE ORWELL, 1984 (1st Am. ed. 1949). This image is not far removed from the reality envisioned by Jim Harper who stated in a committee hearing on Secure Flight that, "[t]he way to do real identity-based security is to do deep, deep background checks into people, know everything about them, where were they educated, what do they think about stuff, how many kids do they have." *House Select Comm.*, *supra* note 42, at *19 (statement of Jim Harper, Director, Information Policy Studies, Cato Institute).

The Court has distinguished between testimonial and physical evidence and its application of the Fourth Amendment in modern jurisprudence. Testimonial evidence is now protected under the Fifth Amendment while physical evidence is protected under the Fourth.[68] *Katz v. United States* expanded the

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[62] JAMES J. TOMKOVICZ & WELSH S. WHITE, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF (4th ed. 2001).

[63] Success rates for Section 1983 claims are dismal and courts have been extremely reluctant to grant relief at the cost of tying the hands of law enforcement agencies. *See generally id.*

[64] *Id.* (noting that scholars and courts alike have questioned the practicality of only excluding the evidence because once the bell is rung, it is extremely difficult to make a person whole again once the harm is done). Moreover, scholars have seriously questioned the effectiveness of 1983 suits as well as tort remedies for civil rights violations. *Id.*

[65] The exclusionary rule cannot be used unless the evidence seized was controlled or possessed by the person it is being used against. With Secure Flight, the Court may rule that aggrieved passengers have no standing to exclude the evidence because the data were held by a private third party. *See generally* TOMKOVICZ, *supra* note 62, at 795-824.

[66] The attenuation doctrine is also known as "Fruit of the Poisonous Tree." Subsequent evidence gathered with knowledge of the illegally obtained evidence will also be tainted. TOMKOVICZ, *supra* note 62, at 795-824.

[67] *See generally* Murray v. United States, 487 U.S. 533 (1988) (creating independent source doctrine to resolve attenuation problems); Nix v. Williams, 467 U.S. 431 (1984) (stating that the inevitable discovery doctrine could replace attenuation doctrine); Brown v. Illinois, 422 U.S. 590 (1975) (holding that additional factors can be considered to dissipate the taint placed by illegal searches); Wong Sun v. United States, 371 U.S. 471 (1963) (establishing premise of attenuation doctrine).

[68] Schmerber v. California, 384 U.S. 757 (1966). Application of Fifth Amendment jurisprudence to the Secure Flight process will be an important analytical

Fourth Amendment's purview to include "intangible" evidence gathered by technology.[69] In *Katz,* the concept, trespass of chattels, was converted from a property right into a privacy right when a listening device was used to eavesdrop on a person using a telephone booth. The Court proceeded to expand the definition of trespass to include searches with technology.[70] The Justices determined that every citizen has a *reasonable expectation* of privacy, which must be protected against unreasonable searches, even those which are not *physically* intrusive.[71] If that expectation is breached, police must acquire a warrant before seizing evidence in order to use it against the defendant.[72]

Although the Supreme Court has suggested that the expectation of privacy is greatly diminished in public places, scholars have questioned the relevance of this reasoning with the advent of extremely high-tech infiltration systems.[73] Thus, the holding in *Katz* should be re-evaluated in light of technological advances, like Secure Flight, which were not possible when the case was decided.[74] The subsequent case of *Kyllo v. United States* promised to clarify and modernize *Katz,* but it ultimately

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requirement but a comprehensive discussion of this topic is beyond the scope of this comment.

[69] Katz v. United States, 389 U.S. 347 (1964) (holding that evidence of trespass is not a property right but a privacy right thereby bifurcating types of protection between the Fourth and Fifth Amendments).

[70] *Katz,* 389 U.S., at 350.

[71] *Id.*

[72] *Id.* at 352 (holding that a subjective and objective expectation of privacy exists whereby society's expectation for crime control is weighed against the individual's need for privacy).

[73] *See* Tracey Maclin, Katz, Kyllo, *and Technology: Virtual Fourth Amendment Protection in the Twenty-First Century*, 72 MISS. L.J. 51, 72 (2002) (stating that *Katz* has not protected civil liberties from the increasing technological invasions of privacy). This is important because Secure Flight uses collated information taken by public means (shopping preferences, credit information etc.) to create a private picture of an individual.

[74] Courts across the country have interpreted *Katz* to permit electronic monitoring in public restrooms, workplaces and in national parks. *See generally* Ohio v. Henry, 783 N.E.2d 609 (2002); United States v. McIver, 186 F.3d 1119 (1999); Vega-Rodriguez v. Puerto Rico Tel. Co., 110 F.3d 174 (1997); United States v. Taketa, 923 F.2d 665 (1991).

failed to advance civil liberty interests or provide clear guidance to law enforcement or the public at large.[75] While *Kyllo* provides for the exclusion of evidence obtained with technological tools or methods not widely available to the public, it fails to address governmental investigation not used for criminal prosecution.[76] The USA PATRIOT ACT and subsequent legislation have greatly expanded the government's ability to investigate private matters as illustrated with Secure Flight's endless reach into private databases.[77] In fact, Thomas Clancy has explained that recent Court decisions favor the use of new technologies for crime fighting without addressing the subsequent erosion of civil liberties.[78]

B. Consent as Waiver of Fourth Amendment Protection

Congress has mandated that airlines have the ability to refuse transport to any passenger they deem a threat to the aircraft.[79] Contingent upon the airline industry's willingness to permit passengers to fly, Congress created legislation requiring would-be-passengers to consent to a search of their person and luggage. If the passenger refuses to consent, the airlines have the ability to deny them boarding privileges.[80] Advocates of Secure Flight will argue that this consent acts as a waiver for the warrant requirement, and thus circumvents the reasonableness requirement.[81] To seemingly tie up the loose ends of a reasonableness requirement, Congress created a condition precedent to flying. The Courts however, have determined that consent waivers must be reviewed by the totality of the circumstances.[82] Requiring mandatory consent fails to address the issue that condition precedents are not absolute. Simply asserting that passengers must consent to *anything* the government requires if they want to fly is no longer "reasonable."[83] But before judicial review of waiver is permitted the activity must infringe upon a fundamental right.

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[75] Kyllo v. United States, 533 U.S. 27 (2001); *see, e.g.,* David A. Sklansky, *Back to the Future:* Kyllo, Katz, *and the Common Law*, 72 MISS. L.J. 143 (2002) (stating that *Kyllo* will likely be the cornerstone for Fourth Amendment debate). *Kyllo* also failed to address what happens when the government uses the information gathered for purposes other than criminal prosecution, like the denial of privileges.

[76] *See* Christopher Slobogin, *Peeping Techno-Toms and the Fourth Amendment: Seeing Through* Kyllo*'s Rules Governing Technological Surveillance*, 86 MINN. L. REV. 1393 (2002).

[77] USA PATRIOT ACT, *supra* note 11.

[78] Thomas K. Clancy, *What Does The Fourth Amendment Protect: Property, Privacy, or Security*, 33 WAKE FOREST L. REV. 307 (1998).

[79] 49 U.S.C. § 44902(a)(1) (2000) (airlines have duty to carry passengers who are not a threat and to deny passage to those who are a safety or security threat).

[80] § 44902(a)(2) (granting airlines ability to deny boarding to passengers who do not consent to search). This is known as "permissive refusal" and shields pilots from potential civil liability if they improperly remove or deny a passenger from boarding the aircraft. *Id.*; Chandrasekhar, *supra* note 18, at 244. This section allows nearly complete immunity regardless whether the passenger posed a threat

C. *Right to Travel as a Fundamental Right*

Secure Flight and its predecessors implicitly infringe upon the liberty interest of a passenger's right to travel. The Supreme Court has held that citizens have the fundamental right to contract, marry, procreate and receive an education.[84] While the Constitution does not specifically enumerate travel as a right, the Court has held that the freedom of movement between states *is* implicitly guaranteed by the Bill of Rights and the United States Constitution.[85] The Court further defined this right in *Shapiro v. Thompson* and held that an activity

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or not, as long as the airline or pilot had reasonable grounds for their actions. Chandrasekhar, *supra* note 18, at 245.

[81] Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (holding that consent must be voluntary based on the totality of the circumstances surrounding the request for consent).

[82] *Schneckloth*, 412 U.S., at 218.

[83] If the Court found "conditions precedent" constitutional for all enumerated rights, women and minorities would probably still not have the ability to vote and certain segments of society could not marry or procreate. At the very heart of a right lies its applicability to all persons at all times, not just when a condition precedent has been met.

[84] Kite, *supra* note 3, at 1403; *see, e.g,.* Joshua D. Zelma, Note, *Recent Developments in International Law: Anti-Terrorism Legislation—Part Two: The Impact and Consequences*, 11 J. TRANSNAT'L L. & POL'Y 421 (2002).

[85] United States v. Guest, 383 U.S. 745 (1966) (holding that the right to travel is fundamental but persons must specifically intend to deprive an individual of this right for a cause to be actionable).

which infringes upon the right to travel must pass strict scrutiny.[86] The *Shapiro* court held that any "classification" which hinders the right to travel, lacking a compelling governmental interest, must be struck down.[87] Because classifying would-be-passengers as flight risks would prevent them from flying, a compelling governmental interest standard will likely be required by the courts. This standard embraces multiple aspects which the Court has noted are different for interstate and international travel.[88]

International travel, much like domestic interstate travel, is still considered an inherent liberty interest.[89] However, courts and scholars alike have noted that international travel has fewer protections than domestic interstate travel.[90] The Court has held that both the President and the Executive Branch may place restrictions on international travel only if they are narrowly constructed.[91] However, neither the President nor the Executive Branch can generally abridge a citizen's right to international travel without a sound justification. In *Haig v. Agee,* the Court held that the government may impose reasonable restrictions on international travel "when there is a substantial likelihood of serious damage to national security or foreign policy."[92] However, that likelihood may not rest upon irrational fear or belief that harm *may* occur.[93]

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[86] Shapiro v. Thompson, 394 U.S. 618 (1969) (holding that although this right to travel is not enumerated, it is a fundamental and long recognized right).

[87] *Id.* at 634.

[88] Haig v. Agee, 453 U.S. 280, 306 (1981) (finding that "the freedom to travel abroad . . . is subject to reasonable government regulations" different from those of interstate travelers).

[89] Califano v. Aznavorian, 439 U.S. 170 (1978); Kite, *supra* note 3, at 1411.

[90] Kite, *supra* note 3, at 1411-12; Heather E. Reser, Comment, *Airline Terrorism: The Effect of Tightened Security on the Right to Travel*, 63 J. AIR. L. & COM. 819, 836 (1998);

[91] Kent v. Dulles, 357 U.S. 116, 129-30 (1958) (holding that Secretary of State did not have authority to completely deny international travel rights).

[92] *Haig,* 453 U.S. at 309; Kite, *supra* note 3, at 1414 (noting that the term "serious damage" is a vague term which may require judicial redress lest the government could continue to erode civil liberties under the guise that they are preventing serious damage when in fact their actions are a pretext).

[93] *Haig,* 453 U.S. at 297. A fear of a specific religion, race, nationality, gender

The government also may not hinder international travelers based on ideological differences.[94] This restriction is especially relevant because Secure Flight, while not advertising to do so, implicitly targets those of Muslim faith and those who agree or sympathize with the Al Qaeda ideology.[95] Both *Kent* and *Aptheker* suggest that even those who are known Al Qaeda must be protected from discrimination just as the communists were supposed to be protected from discrimination during the 1960s. Merely supporting an ideology is not illegal until that belief manifests itself in destructive activities.[96] The Court will require the limitations placed on international travel to be reasonable and narrowly construed especially in light of the prohibitions defined in case law against targeting groups based on their beliefs.[97]

Understandably, compelling reasons exist to prevent persons from hijacking aircraft. However, the error rate for Secure Flight could incorrectly flag nearly 800 to 1200 persons a day as flight risks.[98] That means almost one thousand innocent people per day could be denied their fundamental right to trav-

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or belief will likely be considered "irrational" because Titles VI & VII explicitly prohibit discrimination based on these attributes. *See infra* Section V of this comment and the accompanying footnotes for a more comprehensive discussion of this topic.

[94] Aptheker v. Sec. of State, 378 U.S. 500 (1964) (holding that government may not prohibit members of communist party from international travel because of their ideological beliefs).

[95] Because Secure Flight flags persons who are known members of terrorist organizations, and those organizations are founded on ideological beliefs which threaten the United States, the government will likely target those with similar ideological beliefs as known terrorists. However, this governmental act appears to be in direct violation of *Aptheker* and *Kent*.

[96] *See* Scales v. United States, 367 U.S. 203 (1961); Yates v. United States, 354 U.S. 298 (1957).

[97] *See, e.g.*, Aptheker v. Sec. of State, 378 U.S. 500 (1964); Scales v. United States, 367 U.S. 203 (1961); Kent v. Dulles, 357 U.S. 116 (1958); Yates v. United States, 354 U.S. 298 (1957).

[98] Kite, *supra* note 3, at 1423-24; Sara Kehaulani Goo, *Fliers to Be Rated for Risk Level: New System Will Scrutinize Each Passenger, Assign Color Code*, WASH. POST, Sept. 9, 2003, at A01 (stating that security system will incorrectly identify two percent of passengers incorrectly as flight risks). See *infra* Section IV(B) for a discussion of error rates.

el because a data output suggested they *may* pose a flight risk.[99] The compelling interest standard requires consideration of alternatives which may be less restricting on the affected person. Advocates of Secure Flight challenge this position because the courts have routinely held that there is no right to travel in the most convenient or efficient manner.[100] This position however, fails to address the growing necessity which flight plays in modern America. The Court will need to address the feasibility of denying access to air travel considering the role it plays in the modern world.

D. Property as Fundamental Right

Property interests, just as civil liberty interests, cannot be impeded without due process of law. While flight most easily falls within the liberty interest of "right to travel," interstate and international passengers also have a property interest, which may be impeded by Secure Flight. A passenger's property right to flight, while not enumerated by the Constitution, arises from the fundamental right to enter into contracts unimpeded and the Constitution's reference to the right to life, liberty and *property*.[101] When a passenger purchases a ticket, they "buy" the right to a seat much like a rental or lease agreement.[102] A person's interest in receiving a benefit according to the Court *is* a property interest.[103] The usage of that seat constitutes a legitimate claim of entitlement provided by a contract between the airline and the paying passenger.[104]

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[99] While seeming far-fetched now, this could be something as innocuous as buying oatmeal on a Tuesday and then accessing a flagged website the next day. Because no explanation has been given to the types of information or the algorithms used, it is virtually possible that completely lawful activities, when combined, could end up identifying a passenger as a potential terrorist.

[100] *See, e.g.,* Kansas v. United States, 797 F. Supp. 1042, 1053 (D.D.C. 1992) (holding that prohibiting passengers from boarding plane did not violate the Constitution because there were alternate methods of travel available). The Court however, noted that if no other airport were available or convenient then this limitation on travel would "clearly implicate the right to interstate travel." *Id.* at 1052 n.20. This acknowledgment on the convenience analysis suggests the Court's willingness to see limitations on a person's liberty when access to flight is denied. *Id.* at 1052.

[101] U.S. CONST. art. I § 10 (stating that no "[l]aw impairing the [o]bligation of [c]ontracts, " shall be enacted by the States).

[102] Kite, *supra* note 3, at 1416-17. The actions of the airline in refunding your ticket supports the concept of "rent or lease" of the seat because if you do not

In *Marrone v. Washington Jockey Club,*[105] the Supreme Court held that purchasing a ticket creates a license which permits the licensee to use an item or act a particular way.[106] The Court did note that a contract is formed when a ticket is purchased and that the transaction "binds the person of the maker, but does not create an interest in the property . . . unless it also operates as a conveyance."[107] A conditional conveyance could be interpreted in favor of the passenger because airlines require advance payment before using the seat.

The Court held that the licensor retains the right of revocation.[108] However, they also held that a person denied "entrance" promised by the transaction could sue under a contract claim[109] because the license allows the purchaser to use the privilege in its entirety.[110] Courts have noted that revocation

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use a seat space for the flight, and have notified the airline of this fact beforehand, the airline refunds your purchase price, minus an agreed-upon penalty, or exchanges it for another seat. *Id.*

[103] Perry v. Sindermann, 408 U.S. 593, 601 (1972) (holding that if a person is denied a benefit, then their interest in that benefit is "property" and their claim of entitlement to that property must not be denied without due process); *see also* Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) (holding that due process was unnecessary because the professor's Fourteenth Amendment rights were not implicated).

[104] Marrone v. Wash. Jockey Club, 227 U.S. 633, 636 (1913) (holding that ticket purchaser has right to use seat but the licensor retains right to revoke the ticket at will).

[105] *Id.* at 636; *see also* Stoner v. Zucker, 148 Cal. 516 (1906).

[106] A license is different from a normal contract relationship because its termination rests upon the will of the licensor, unlike a normal easement. JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 378 (3rd ed. 1989). "Whether or not there is an entitlement will . . . depends on the legislative framework under which the claim is made." D.J. GALLIGAN, DUE PROCESS & FAIR PROCEDURES: A STUDY OF ADMINISTRATIVE PROCEDURES 195 (1996).

[107] *Marrone,* 227 U.S. at 636; *see also* Kelly v. Societé Anonyme Beige D'Exploitation de la Navigation Aerienne, 242 F. Supp. 129 (E.D.N.Y. 1965).

[108] *Marrone*, 227 U.S. at 637; *see also* Spencer v. Rabidou, 340 Mass. 91, 93 (1959); Foster v. Shubert Holding Co., 316 Mass. 470, 473 (1944). *See generally* 27A Am. Jur. 2d *Entertainment and Sports Law*, § 43 (1996).

[109] *Marrone*, 227 U.S. at 636.

[110] Hurst v. Picture Theaters, 1 K.B. 1, 11 (1915) (finding by an English court

of a license is only permissible so long as no *substantial harm* is caused to the licensee.[111] The Court's recognized limitation may provide a successful avenue for persons who are flagged "red" and denied their right to board the aircraft, thereby creating a contract breach.[112]

Moreover, courts are beginning to accept "expectancy of interest" as a property right.[113] In *Yarde Metals, Inc. v. New England Patriots* the court stated that ticket renewals, which include expectancy interests, constitute property.[114] Expectancy "creates a property interest in the season ticket holder."[115] The court noted that as a ticket holder's reasonable expectancy grows, they accumulate a greater property right.[116] Accumulation, through repeated dealings, has become a recognized principle where courts have acknowledged a property interest.[117]

Much like any rental or lease agreement, an airline ticket comes with certain stipulations.[118] One of these conditions is

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that ticket holder had the right to watch a movie from its beginning until its termination and any denial of that right was a violation, actionable under tort law).

[111] Young J. Lee, Inc., v. Pennsylvania, 474 A.2d 266, 270 (1983) (stating "Government licenses generally constitute a form of property insofar as they are an entitlement to engage in a valuable activity."). The court noted that "certain types of licenses, particularly a license to engage in a profession or occupation, may create a right or entitlement which triggers procedural rights under the due process clause of the Fourteenth Amendment." *Id.* The court noted that a government cannot require a license without providing sufficient due process. *Id.* (citing Doran v. Houle, 516 F.Supp. 1231 (D. Montana 1981) and Gonzalez v. Freeman, 334 F.2d 570 (D.C. 1964)).

[112] Kite, *supra* note 3, 1418.

[113] Grossman v. Boston Red Sox Baseball Club Ltd. P'ship (*In re* Platt Debtor), 292 B.R. 12 (Bankr. D. Mass. 2003) (recognizing creation of property interest in season ticket renewal based on expectancy); *In re* I.D. Craig Serv. Corp., 138 B.R. 490, 502 (Bankr. W.D. Pa. 1992) (noting that a season ticket holder's annual opportunity to renew constituted a recognizable and saleable asset).

[114] Yarde Metals, Inc. v. New England Patriots Ltd. P'ship, 16 Mass. L. Rptr. 733, *10 (Mass. 2003) (*aff'd by* 834 N.E.2d 1233 (2003)) (stating that "the season tickets are indeed property"). *Contra In re* Liebman Debtor, 208 B.R. 38, 39 (1997) (holding renewal rights for a season ticket holder did not give rise to a property interest).

[115] *Yarde Metals*, Inc., 16 Mass. L. Rptr. at *12.

[116] *Id.* at *10.

[117] Perry v. Sindermann, 408 U.S. 593, 596-98 (1972).

[118] Kite, *supra* note 3, at 1417 n.184; *see also* Harby v. Saadeh, 816 F.2d 436

the consent waiver already discussed. However, Congress' mandate that airlines must carry passengers who are not a threat[119] suggests that passengers who have not acted in a manner creating a "threat" would have a cause of action if they are denied their property interest. This is especially relevant if those aggrieved passengers are not afforded a proper form of redress through due process.[120]

E. Due Process Violations

Secure Flight and its predecessors implicitly infringe upon the liberty and property interests of would-be-flyers. However, infringement alone does not make an activity unconstitutional unless there is no means of review.[121] This "review" is commonly known as due process.[122] Due process is the ability for an aggrieved individual to seek review or be heard by a governing body and have it determine if the infringement was warranted.[123] Because aggrieved passengers have both a liberty interest in their right to travel and a property interest in flying, an unreasonable infringement of these rights demands an adequate form of redress.[124] To determine if appropriate due

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(9th Cir. 1987).

[119] § 44902(a)(1).

[120] Once a property interest is recognized, denial of that interest must be accompanied by a review of 1) determination of the interest only upon valid grounds, 2) afford a means of due process to determine if the termination was for just cause, and 3) determine whether adequate remedial measures were taken or that reasonable sanctions were in place. *Yarde Metals*, 16 Mass. L. Rptr. at *17. The court also noted that a "ticket holder must have a fair opportunity to present information [o]n his behalf." *Id.* at *18.

[121] *See generally* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW (14th ed. 2001); William D. Anderson, Jr., *Investigation and Police Practice: Overview of the Fourth Amendment*, 82 GEO. L.J. 597 (1994).

[122] *See supra* note 121.

[123] U.S. CONST. amends. V, VI, XIV § 1 (analysis of the overlapping properties of these amendments is beyond the scope of this paper). For further analysis of the due process clauses consult the following. *See e.g.*, Perry v. Sinderman, 408 U.S. 593, 599 (1972) (holding that a right to be heard is part and parcel of the due process clause when a liberty interest is infringed). *See generally* JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW (3rd ed. 2003); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW (3rd ed. 2001); SULLIVAN, *supra* note 121; TOMKOVICZ, *supra* note 61.

[124] U.S. CONST. art. I § 10; *see also supra* notes 99-110, and accompanying

process procedures are in place, a brief review of the redress procedure is required.

IV. REVIEW OF SECURE FLIGHT'S REDRESS PROCEDURES

A. Mathews v. Eldridge *Standard of Review*

The case of *Mathews v. Eldridge* provides the framework for reviewing the adequacy of the current Secure Flight procedures.[125] The *Mathews* court established three factors which courts must balance to determine if the requirements of the Fifth and Fourteenth Amendments have been met. *Mathews* looks at (1) the civil liberty interests of the aggrieved party, (2) the risk of erroneous deprivation of those rights, (3) the government's interest, including less restrictive alternatives, and the burden those methods place on the government.[126] All three elements must be considered and met before a government program passes judicial review.

B. Secure Flight's Current Redress Procedures

When a passenger arrives at the airport gate and presents their ticket and identification, Secure Flight goes into action searching vast private databases and government maintained watch lists of suspected terrorists.[127] Sources predict that error rates for this process could be as high as thirty percent,[128] and others claim the system will have an error rate of *no lower* than two percent.[129] TSA has admitted that there is a real potential for high numbers of erroneous red-coded passengers and

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text.

[125] Mathews v. Eldridge, 424 U.S. 319 (1976).

[126] *Id.* at 335.

[127] *See* U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, AVIATION SECURITY: COMPUTER-ASSISTED PASSENGER PRESCREENING SYSTEM FACES SIGNIFICANT IMPLEMENTATION CHALLENGES, GAO-04-385, at 6 (Feb. 2004), *available at* http://www.gao.gov/new.items/d04385.pdf (last visited Jan. 13, 2006) [hereinafter GAO Report].

[128] *See, e.g.*, Lane County Bill of Rights Def. Comm., *CAPPS II*, *available at* http://www.lanerights.org/capps.htm (last visited Jan. 13, 2006).

[129] Audrey Hudson, *Airline Profiling System Defended*, WASH. TIMES, Feb. 13, 2004, at A11; Goo, *supra* note 98, at A01.

they "ha[ve] no indication of the accuracy of [the] information contained in [the] government databases."[130] Statistically speaking this means that between 400 to 1200 innocent people who have committed *no crime* will be red-coded, handcuffed and led away by the police for being suspected terrorists when they arrive at the airport.[131] Not even Secure Flight's advocates can reach a consensus about whether the number of erroneously labeled "terrorists" will increase or decrease over time.[132]

With the ever growing problem of identity theft[133] and its apparently permanent lasting effects, Secure Flight will likely cause growing numbers of victims to be red-coded because someone else used their I.D. This growing problem will probably cause Secure Flight to identify innocent individuals as flight risks.[134] Thus, the incidence of identity theft compounded with the already unreasonable error rates projected by experts creates significant issues for the public.[135]

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[130] GAO Report, *supra* note 127, at 15.

[131] Kite, *supra* note 3, at 1421; Goo, *supra* note 98, at A01. These figures are based on an one million person per day average.

[132] Kite, *supra* note 3, at 1421; Ann Davis, *Boarding Impasse: Why a 'No Fly List' Aimed at Terrorists Often Delays Others*, WALL ST. J., Apr. 22, 2003, at A14.

[133] *Statement of Mr. Marc Rotenberg, President and Exec. Dir., Elec. Privacy Info. Ctr. Comm. on S. Commerce, Sci. & Transp.*, 109th Cong. (May 10, 2005) (statement of Mark Rotenberg) (noting that the problems with identity theft become even more problematic once they begin playing a central role in "identity verification procedures for Secure Flight"); Catherine Pastrikos, Comment, *Identity Theft Statutes: Which Will Protect Americans The Most?*, 67 ALB. L. REV. 1137, 1142 (2004) (stating that identity theft results in harms to "the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense" *citing* Sean B. Hoar, *Identity Theft: The Crime of the New Millennium*, 80 OR. L. REV. 1423, 1432 (2001)); Liz Pulliam Weston, *Blame Lenders, Not Thieves for Identity Theft*, CNBC MONEY MATTERS, http://moneycentral.msn.com/content/Banking/FinancialPrivacy/P48173.asp?GT1=6239 (stating that because of two fraudulent entries in the LexisNexis consumer database, over 180,000 people had had their identities stolen from that database alone) (last visited Jan. 13, 2006). Constant refusal by lenders to work within policy complicates the issue and victims are left without anywhere to turn to fix their problem. Weston, *supra*. Lenders refuse to abide by search warrants or requests for information from out of state courts and refuse to speak with police investigating complaints because they make more money by using lax application procedures. *Id.* Consumer databases and the lenders who use them have hardly any oversight and use it to their advantage. *Id.* Recently, a subsidiary of LexisNexis had its customer database hacked and over 310,000 people had their social security numbers, drivers license and address stolen and the company did not even know it until they happened upon it accidentally. The Associated Press, *LexisNexis ID Theft Much Worse Than Thought*, MSNBC NEWS, http://www.msnbc.msn.com/id/7475594/ (stating that Reed Elsevier's database located in Boca Raton, Florida provides data for Matrix) (last visited Jan. 13, 2006). Reed Elsevier's Matrix contract is one of the United State's anti-terrorism database contracts that is currently used by TSA and will be utilized by Secure Flight. *See id.* Perhaps the theft of over 300,000 identities in a data-

Americans have had to learn to cope with being embarrassed by accusations of theft from the prevalence of automated security systems.[136] Now, to add an additional level of humiliation to daily life, beyond cashiers failing to properly deactivate sensor strips,[137] citizens and visitors can look forward to wor-

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base used by Secure Flight will prompt Congressional review because of the great potential for error and abuse in dataveillance?

[134] After people have realized they are victims of identity theft, many have been unable to fix it because States refuse to delete records created by the identity thief. *See generally* Beard v. City of Northglenn, 24 F.3d 110 (10th Cir. 1994) (noting that identity theft victims would have great difficulties in proving law enforcement's breach of duty after being falsely arrested); Johnson v. Scotts Bluff County Sheriff's Dep't, 245 F. Supp. 2d 1056 (D. Neb. 2003) (holding that there was no constitutional redress available for a plaintiff who was arrested and fined because of identity theft); Neville v. Classic Gardens, 141 F. Supp. 2d 1377 (S.D. Ga. 2001) (holding that absolute immunity prevented an identity theft victim who was arrested and then re-arrested several times from seeking redress against the law enforcement agency or prosecuting attorney). Many of these victims must carry documents for the rest of their lives explaining to people they are not truly felons, child molesters or insolvent. With the current Secure Flight system, this "carry-around documentation" would not alleviate the problem because the government will posit that these documents could easily be forged or presented by actual terrorists. *See Select House Comm.*, *supra* note 5. Moreover, while these identity theft victims try to explain their dilemma to the arresting officer, their flight will be leaving with their families or friends on board or even worse causing the entire family to miss out on their vacation, wedding or other "once in a lifetime" event.

[135] Kite, *supra* note 3, at 1421; Goo, *supra* note 98, at A01; Davis, *supra* note 132; Hudson, *supra* note 129.

[136] *See generally* Jamie James, *Why I Don't Live in America*, AM. SCHOLAR, Autumn 2004, 109 (relating author's reasons for leaving America to live in Indonesia, one of which was a pervasive feeling of too little trust). Catherine Pastrikos notes that, "[c]omplications from identity theft may also require embarrassing explanations if employers or law enforcement officials perform a background check on a victim." Pastrikos, *supra* note 133, at 1154.

[137] *See, e.g.*, Deseriee A. Kennedy, *Processing Civil Rights Summary Judgment and Consumer Discrimination Claims*, 53 DEPAUL L. REV. 989 (2004); James P.

rying about being erroneously labeled a terrorist at the airport.[138] Passengers may now fear being flagged "red" and led away in handcuffs in front of family, friends or co-workers because a computer has misdiagnosed a personal preference, commercial purchase or entity authentication.

Because of the potential level of inconvenience and embarrassment, most would expect an efficient and effective oversight system to mitigate the damage. After all it is only reasonable that the government would place a premium on "fixing" whatever led the computer to erroneously red-code a passenger in the first place. Much to the shock of this author, almost no procedures exist whereby an aggrieved red-coded passenger can seek redress, or for that matter even find out why they were flagged as a potential terrorist in the first place.[139] TSA and the Department of Homeland Security prevent aggrieved passengers from ever knowing why they were flagged "red."[140] Moreover, red-coded persons may only bring complaints against TSA based on information they obtained from their *own* records[141] thereby making it nearly impossible to successfully challenge a Secure Flight assessment.[142] This means that pas-

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Nehf, *Incomparability and the Passive Virtues of Ad Hoc Privacy Policy*, 76 U. COLO. L. REV. 1 (2005); Amanda G. Main, Note, *Racial Profiling In Places of Public Accommodation: Theories of Recovery and Relief*, 39 BRANDEIS L.J. 289, 296 (2001).

[138] Once this fear becomes a reality our society moves one step closer to Orwell's government controlled dominance of its citizens. "[Computer] data processing creates a potential for suppressing a capacity for free choice. The more that is known about an individual, the easier it is to force his obedience. . . . The state and private organizations can [then] transform themselves into omnipotent parents." Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1396 (2001) (alteration in original) (*citing* PAUL M. SCHWARTZ & JOEL R. REIDENBERG, DATA PRIVACY LAW 39 (1996)).

[139] It is important to note that once a passenger has been red-coded and denied boarding the damage has been done because they have been denied their liberty interest without due process of law. TSA fails to address this issue when outlining its redress procedures. If a person's liberty or property interest is infringed without due process that, by itself, is a violation of a fundamental right provided by the United States Constitution.

[140] Kite, *supra* note 3, at 1424.

[141] *Id.* at 1425.

[142] According the GAO Report, "TSA officials stated that passengers will not

sengers can only access the information they *personally* provided when purchasing the tickets such as their name, address, telephone number, credit card number, date of birth and any other distinguishing factors.[143] These factors are known as the passenger name record (PNR).[144] The PNR information, which is sent automatically to be cross-checked with Secure Flight, determines whether the person is coded green or red. None of the relevant information that flagged them will be disclosed to the passenger, and they will receive no explanation as to why they were denied passage.[145] This policy suggests a withdrawal from the fundamental right defined in the common law to confront one's accuser which harkens back to the trial of Sir Walter Ralegh.[146] The modern law as well still requires that evidence be presented against the accused *before* they can be punished. Secure Flight and TSA apparently have chosen to disregard these requirements as aggrieved passengers are told nothing about why they were flagged "red."

Consider the apprehensive feeling you may experience: your entire trip is cancelled, you have been humiliated in public and not told why. Little could be more discouraging than being stopped, handcuffed and escorted away by police, leaving

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have access to any government data used to generate a passenger risk score due to the national security concerns." GAO Report, *supra* note 127, at 26.

[143] GAO Report, *supra* note 127, at 26; Kite, *supra* note 3, 1425.

[144] Steven Roberts, *Big Brother is Watching*, 26 NAT'L L. J. 62, 63 (2004).

[145] GAO Report, *supra* note 127, at 26; Kite, *supra* note 3, at 1426. Although it is possible that someone would declare their terrorist nature while purchasing their ticket, it is extremely unlikely that any information used when purchasing their ticket would be relevant. In fact, an actual terrorist, set upon hijacking a plane after September 11, 2001, is unlikely to use accurate information when purchasing their ticket. *See* Pam Fessler, *Problems Plague 'No-Fly' List, TSA Considers Changes*, NPR NEWS, Apr. 26, 2005, http://www.npr.org/templates/story/story.php?storyId=4619602 ("A big problem is that most of the information about the lists—how one gets on or off or even how big they are—is secret.").

[146] *See generally* Karen Cunningham, *"A Spanish Heart in an English Body": The Ralegh Treason Trial and the Poetics of Proof*, 22:3 J. OF MEDIEVAL & RENAISSANCE STUDIES 327 (1992); Mark Nicholls, *Sir Walter Ralegh's Treason: A Prosecution Document*, 110 ENG. HIST. REV. 902 (1995); Mark Nicholls, *Two Winchester Trials: The Prosecution of Henry, Lord Cobham, and Thomas, Lord Grey of Wilton, 1603*, 68 HIST. RESEARCH: THE BULLETIN OF THE INST. FOR HIST. RESEARCH (1995).

friends and family standing at the airport gate and the accused being told by airport security that the only information they can provide is your name, birth date and telephone number.[147] To make matters worse the passenger information will be preserved for only a short period of time according to TSA.[148] Thus, the information which flagged the individual will likely be deleted before they can take action to correct it.

C. Mathews *Analysis*

America changed on September 11, 2001. For the first time there were indistinguishable enemies walking among everyday citizens who would kill, maim and destroy in the name of their ideology. No declaration of war was ever announced against the United States. No notice was given to the American people that they had become enemy combatants. President Bush stated during an address:

> Americans have known wars—but for the past 136 years, they have been wars on foreign soil . . . Americans have known the casualties of war—but not at the center of a great city on a peaceful morning. Americans have known surprise attacks—but never before on thousands of civilians. All of this was brought upon us in a single day—and night fell on a different world, a world where freedom itself is under attack.[149]

Unlike past conflicts where the enemy wore unique uniforms, the enemy is now virtually indistinguishable from any other citizen co-existing in our country. America's reaction to September 11th was multifaceted, rapid and far-reaching.

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[147] Implicit in this scenario is the issue of false imprisonment and lack of probable cause; however, discussion of this expansive topic is beyond the scope of this paper but should be noted when considering the potential impact of Secure Flight on passengers and their Constitutional rights.

[148] Press Release, U.S. Dep't of Home Security, CAPPS II: Myths and Facts, *available at* http://www.dhs.gov/dhspublic/displa (last visited Mar. 3, 2005).

[149] President George W. Bush, Address to a Joint Session of Congress and the American People, *available at* http://www.whitehouse.gov/news/release/2001/09/20010920-8.html (Sept. 20, 2001) (last visited Mar. 30, 2005).

Part one of *Mathews* asks whether a civil liberty interest has been impeded. Section III of the comment concluded that both the right to travel and property interests are likely to be found impeded by Secure Flight.[150] *Mathews* then asks whether there is a risk of erroneous deprivation of liberty. Section IV(B) of the comment concluded that the high error rates strongly suggest a high risk to liberty interests.[151] Finally, review of the burden placed upon the government by implementing the program and whether any less restrictive methods exist constitutes the last *Mathews* prong.[152] The government's duty to protect must outweigh the liberty interests violated before the *Mathews* prong is met.

1. Availability of Less Restrictive Methods

The government faces a nearly insurmountable responsibility. The American people have asked the government for protection from an unseen enemy. The government's burden is heavy because the nations' security must be weighed against the fundamental rights of its citizens. TSA and the Department of Homeland Security must navigate their way through "life, liberty, and property" while still protecting the citizenry from an unseen danger.

Regardless of the difficulties presented, the government's duty to not infringe upon the fundamental rights is nonetheless absolute unless there are no less restrictive alternatives. If additional safeguards exist which do not unduly burden the government's interests then they must be implemented in place of those which more adversely infringe upon a citizen's liberties. In the case at hand, no efficient evidentiary hearing is available whereby aggrieved citizens can confront their accusers or correct errors.

While the government claims that providing early notice would limit their ability to catch would-be-terrorists, this explanation fails on several levels.[153] According to TSA, the goal of

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[150] *See generally supra* notes 84-120, and accompanying text.

[151] *See generally supra* notes 127-148, and accompanying text.

[152] *Mathews*, 424 U.S. at 335.

[153] Secure Flight "relies upon a certain 'surprise' element in apprehending sus-

Secure Flight is simple—to prevent hijackings.[154] However, activities which go beyond this goal would be *ultra vires* and no longer a reasonable justification for eroding civil liberties. For instance, if the government were allowed to use an aircraft flight as a pretext for extensive, warrantless, criminal searches it would circumvent the established case law of *City of Indianapolis v. Edmond*.[155] The *Edmond* court held that sobriety checkpoints could not be used as a pretext for drug searches or crime prevention.[156] Thus, it is unlikely that the Supreme Court would allow a safety inspection at an airport to become a pretext for crime fighting, yet that is exactly what Secure Flight proposes. It essentially mandates an extensive search to determine risk at safety checkpoints before passengers board the aircraft.[157]

2. Proposed Solutions

If Secure Flight's check was performed at the time the passenger purchased the ticket these constitutional concerns would be greatly diminished. Simply telling the passenger that they are being red-coded immediately would serve both goals. The government would have successfully stopped a security risk from flying[158] and allowed the would-be-traveler to re-

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pected terrorists at the airport." Kite, *supra* note 3, at 1431. The government hopes to spring their trap upon unwary passengers who are coded "red." *Id.*

[154] *Id.* at 1432.

[155] City of Indianapolis v. Edmond, 531 U.S. 32, 41 (2000) (holding that "[w]e have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.").

[156] *Id.* The Court held that to create a pretext to circumvent what would be an unlawful search is a violation of the Fourth Amendment. *Id.* at 48.

[157] *Id.* at 41. The Court notes that the constitutionality of check point programs depend upon a balancing test of competing interests for the sake of the program. *Id.* at 45; *see also* Scott E. Sundry, *Protecting the Citizen "Whilst He is Quiet": Suspicionless Searches, "Special Needs" and General Warrants*, 74 MISS. L.J. 501 (2004) (noting that some courts have allowed general warrantless searches when special needs were demonstrated). If the Court deems "flight risk" as exhibiting such importance, TSA may be placed under a special needs category and allowed to continue Secure Flight unimpeded. *Id.* at 549. Sundry however, comments that a movement toward this rational would be against the framers intent for the Fourth Amendment. *Id.* at 502.

[158] It should be noted in brief that allowing Secure Flight to be implemented

ceive notice of their denial in time for them to exercise their fundamental right to travel through other means.[159] Moreover, if the passenger was red-coded and *was wanted* for past crimes it is still likely that the government could apprehend them. As Kite correctly notes, the government's interest could still be achieved by apprehending the potential terrorist while at home rather than at the airport.[160]

Next, more efficient methods of redress must be made available to aggrieved passengers. Red-coded passengers must be told why they were flagged and denied their ability to travel. Understandably, procedures will need to be developed to prevent actual terrorists from learning what types of information creates an alert. It may be possible to only expose specific items or groupings of activities that caused the red-coding. Discussion regarding the type of information which could be released, while not interfering with national security, is beyond the scope of this comment.[161] However, functioning under a cloak of secrecy when assessing guilt is contrary to the common law and the fundamental rights guaranteed to all individuals residing in America.[162] Furthermore, depending upon the number of passengers who are actually flagged, a streamlined approach or "mini-airport-court" may be required to handle the large docket of erroneously flagged passengers.[163]

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may be a first step into creating passenger screening for all mass transit forms. Secure Flight may be a slippery slope to excluding "would be security risks" from traveling at all. If that day does arrive, Orwell and other neo-fatalist's bleak visions of the future will become a reality.

[159] Beyond the scope of the paper are the excessive types of damages a passenger could incur if they were stopped from flying. For example, business deals may not be completed, hotels and other vacation expenses may be lost, wedding parties might be missed or graduation expenses gone to waste because a passenger at a crucial moment was denied their ability to travel.

[160] Kite, *supra* note 3, at 1432.

[161] Understandably the types of information released to an aggrieved party after being flagged "red" will cause substantial difficulties. If these factors were exposed through the due process review then the entire system could fail because actual terrorists could more easily circumvent the system by not exposing themselves to risk enhancing factors. Discussion of this topic, while beyond the scope of this paper, will be a fertile source for future discussion.

[162] *See generally supra* notes 122-124, and accompanying text.

[163] Kite, *supra* note 3, at 1433. In a statement made by James Dempsey, he

Finally, regulation of Secure Flight is extremely important to its success. Congress must take steps to ensure that the information used is properly protected and monitored. Multiple levels of clearance must exist to prevent abuses at all levels of Secure Flight's incorporation because employees responsible for implementing new technologies have been known to misuse sensitive information for personal gain.[164] With the proper supervision Secure Flight could become more efficient and trustworthy rather than deteriorating into a tool of abuse.

V. OUTSIDE LEGAL REMEDIES

Unfortunately, racial profiling will be one side effect of Secure Flight.[165] The Department of Homeland Security and TSA both claim that neither race nor religion will be included in their "secret" search parameters. However, it only makes sense to look for a middle-eastern Muslim if Muslims from the middle-east are the acknowledged terrorist group threatening the national security of the United States.[166] If TSA and the

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acknowledged that TSA has indicated that it will create a "Passenger Advocate Office" which will act on behalf of aggrieved passengers; however, he notes that TSA will "need to flesh out the procedures that will govern the review of complaints." *See House Select Comm.*, *supra* note 5.

[164] For instance new surveillance monitors placed in metropolitan cities have been abused by employees shortly after their implementation. *See* M. L. Elrick, *Cops Tap Databases to Harass, Intimidate: Misuse Among Police Frequent, Say Some, But Punishments Rare*, DETROIT FREE PRESS, July 31, 2001. Police have been caught selling footage taken by surveillance cameras of couples engaged in sexual activity to pornography dealers and that of criminal activity to syndicated crime shows. *Id.* More shockingly, project designers of the Miami Beach Police Department had hoped to profit from selling captured video images to local television stations. Quentin Burrows, *Scowl Because You're on Candid Camera: Privacy and Video Surveillance*, 31 VAL. U. L. REV. 1079, 1082 (1997). Several of these video clips have appeared on the show "Caught in the Act" much to the surprise of those filmed. *Id.* Many tax payers question why they have footed the bill so that police department employees can turn a profit from technology designed to catch criminals. *Id.*

[165] Tracey Maclin, *"Voluntary" Interviews and Airport Searches of Middle Eastern Men: The Fourth Amendment in a Time of Terror*, 73 MISS. L.J. 471, 472 (2003) (noting that America's attitude toward racial profiling drastically changed after 9/11 toward almost complete acceptance of profiling at airports).

[166] *Id.* at 510 (stating that a "well-designed profiling system" could significantly

Department of Homeland Security are not forced to reveal their search parameters, the public will never know if discrimination on the basis of race, religion or sex has taken place.

If these departments are discriminating on the basis of color, race or religion, then redress may be sought through Section 1981.[167] Racial profiling cases have already been brought against several airlines which prohibited passengers from boarding or removed passengers from the aircraft based on their nationality.[168] Section 1981 precludes profiling or discriminating based on race, religion, sex or national origin. However, a conflict may arise with 1981 claims because many middle-eastern peoples technically fall under the broad term Caucasian.[169] Moreover, because many middle-eastern peoples are actually American citizens, they do not receive protections under national origin either.[170] Proving discrimination based on race or national origin will be a difficult battle for aggrieved passengers because of TSA's refusal to disclose the "secret" information which red-coded them in the first place.[171] Similar claims may be brought under Title VI.[172] Analysis of these issues is beyond the scope of this paper but must be addressed by the Court and TSA before allowing Secure Flight to be fully implemented.

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increase efficiency and preclude unnecessary burdens on those who are not threats).

[167] Section 1981 states it is unlawful to "discriminate based on . . . *race,* color, *religion*, sex, or *national origin*" 42 U.S.C. § 1981 (1991); 42 U.S.C. § 1982 (1978) (providing right to civil redress without agency involvement) (emphasis added). Sections 1981 and 1982 allow aggrieved citizens more avenues of redress which suggests a trend that Congress wants to provide as many options as possible to citizens.

[168] Chandrasekhar, *supra* note 18, at 232.

[169] The three recognized races are Caucasian, Negroid and Mongoloid.

[170] Extensive analysis of this topic is beyond the scope of this paper but for an excellent review of this topic see *Chandrasekhar*, *supra* note 18, at 233-241.

[171] GAO Report, *supra* note 127, at 26; Kite, *supra* note 3, 1425.

[172] 42 U.S.C. § 2000d (2003) (stating that person can not discriminate against any individual because of the individual's *race, color*, religion, sex, or national origin).

VI. CONCLUSION

The government does have a compelling interest in protecting national security, but several modifications to Secure Flight will be required to enable the government to meet all the *Mathews* factors and justify the infringement of civil liberties. However, failure to take corrective steps will likely result in more trouble for the airline industry. Foreign travelers have already begun choosing destinations other than the United States because of the excessive wait times, security issues and uncertainties which now await travelers.[173]

Air travel as a means of transportation, once considered *haute couture,* has lost its luster and is now about as pleasant as a subway ride.[174] Travelers are told to arrive at airports two hours or more ahead of time to allow for long security lines.[175] Then, rather than being welcomed by cheery smiles and common courtesy, flyers are subjected to potentially unconstitutional searches and investigations before being allowed to board. Passengers are now confronted with a host of unpleasant experiences for the sake of security and it doesn't seem to be getting better.[176] The financial loses faced by the airline industry suggest that these issues will need to be addressed or else passengers may no longer consider flying as a viable mode of travel.

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[173] *See* Mark Sage, *All Britons Arriving in USA to be Fingerprinted and Photographed*, PA. NEWS, Sept. 29, 2004 (increased security, scrutiny and delays have stopped many international travelers from visiting America); *contra Brits Keep Crossing the Pond*, ST. LOUIS POST-DISPATCH, Feb. 23, 2004 (noting that the deflating American dollar keeps some foreigners from visiting America because they get more for their money).

[174] *Delays Warning in U.S. Air Security Crackdown: Fingerprints and Photos to be Taken as Anti-Terrorist Rules Tightened*, SCOTTISH NEWSPAPERS LTD., Sept. 29, 2004 (noting that 33,000 people coming into the US will be effected every day and this will result in even longer wait times and delays); *see also House Select Comm. supra* note 5 (noting that No-Fly list then had 260,000 names, however, only 37,000 are considered serious threats); Dan Eggen & Walter Pincus, *325,000 Names on Terrorism List*, WASH. POST, Feb. 15, 2006, at A1 (reporting that the No-Fly list had increased to 325,000 names). Considering the similarities of some anglo-saxon names, commercial data base extrapolation and problems with identity theft, a list of this magnitude illustrates the immense problems which Americans and foreign nationals may face when attempting to fly. Moreover, it is highly unlikely that 260,000 or, for that matter, 37,000 citizens honestly endeavor to embark upon terrorist activities.

[175] UNITED AIRLINES Inc., Airport Check-in Information, *available at* http://united.com/page/article/0,6722,2131,00.html (noting minimum check in times for travelers depending on destination) (last visited Jan. 13, 2006).

Stephen W. Dummer[177]

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[176] *See* Lauren Bayne Anderson, *It's Time to Ditch Your Bics at Airport,* ST. PETERSBURG TIMES, Apr. 13, 2005 (stating that recent White House reports show that airport safety is no better than before September 11th even with current TSA improvements).

[177] J.D. Candidate, University of Mississippi School of Law 2006; B.A. *cum laude* with Honors, Phi Beta Kappa, University of Wyoming 2003; A.A. with Honors, Northwest College 2000. I would like to thank my family for their enduring love, support and encouragement. I would also like to thank my fiance, Geneva M. Vasser, for her patience, love and understanding.

RECENT DECISION

CONSTITUTIONAL LAW—THE DORMANT COMMERCE CLAUSE AND THE TWENTY-FIRST AMENDMENT—RECONCILING THE TWO CONSTITUTIONAL PROVISIONS TO ALLOW THE DIRECT SHIPMENT OF WINE[*]

I. FACTS

The distribution of wine in most states requires a three-tier system, under which wine producers sell their product to wholesalers, who sell the wine only to in-state retailers, and these retailers then sell the wine to consumers.[1] However, some states have carved an exception to this wine distribution system for in-state wineries by enabling them to ship their products directly to consumers.[2] Citizens of Michigan alleging these direct shipment laws violated the Commerce Clause of the United States Constitution brought suit against state officials in the District Court for the Eastern District of Michigan.[3] In response, a liquor trade association, the Michigan Beer & Wine Wholesalers, joined in the defense of these laws, and together the defendants claimed that the right to ban out-of-state direct shipment of wine was guaranteed to states under Section Two of the Twenty-First Amendment.[4] After the trial court issued summary judgment upholding the statutes, the Court of Appeals for the Sixth Circuit reversed the decision.[5]

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[*] Outstanding Case Note Award presented by Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.

[1] Granholm v. Heald, 125 S. Ct. 1885, 1893 (2005). The scheme incorporates "a complex set of overlapping state and federal regulations." *Id.* at 1892. This scheme has previously been upheld by the Supreme Court as being a valid exercise of a state's Twenty-First Amendment authority. *Id.*

[2] *Id.* Some form of direct shipment of wine is allowed in approximately twenty-six states, including reciprocity laws. *Id.* at 1893. Reciprocity laws allow out-of-state wineries to ship wine directly to another state's consumers if the "State of origin affords similar nondiscriminatory treatment." *Id.* Specifically in Michigan, the State allowed in-state wineries to circumvent the three-tier requirements if

Similarly in New York, out-of-state winery operators and New York citizens brought a lawsuit against state officials alleging that New York's laws violated the Commerce Clause.[6] However, New York's procedural record is the reverse of Michigan's, as the District Court for the Southern District of New York granted summary judgment for the plaintiffs.[7] The Court of Appeals for the Second Circuit re-

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they paid a fee for a direct shipment license. *Id.* at 1893-94; *see also* MICH. COMP. LAWS. ANN. § 436.1113(9) (West 2001), §§ 436.1537(2)-(3) (West Supp. 2004); MICH. ADMIN. CODE r. 436.1011(7)(b) (2003). However, this license was not available to out-of-state wineries. *Id.*; *see also* MICH. COMP. LAWS ANN. §§ 436.1109(9) (2001), 436.1525(1)(e) (West Supp. 2004). On the other hand, New York permitted direct shipment of wine if the wine was made from New York grapes. *Id.* at 1894; *see also* N.Y. ALCO. BEV. CONT. LAW §76-a(3) (McKinney Supp. 2005). Also, New York allowed out-of-state wineries to ship wine directly to its citizens if the winery established an office within the State of New York. *Id.*; *see also* N.Y. ALCO. BEV. CONT. LAW § 3(37) (McKinney Supp. 2005).

[3] *Heald*, 125 S. Ct. at 1894.

[4] *Id.* at 1894.

[5] *Id.* at 1894. The court held that the Twenty-First Amendment does not immunize a state from the requirements of the Commerce Clause, and concluded that Michigan's laws were unconstitutional. Heald v. Engler, 342 F.3d 517, 524-27 (6th Cir. 2003), *aff'd sub nom.* Granholm v. Heald, 125 S. Ct. 1885 (2005).

[6] *Heald*, 125 S. Ct. at 1893-94. Additionally, New York wholesalers and retailers joined the lawsuit in support of the State's position. *Id.* at 1894. The out-of-state wineries argued that because of the laws prohibiting direct shipment, New York tourists were unable to purchase additional wine from the winery when they returned home to New York. *Id.* at 1893. Furthermore, the wineries asserted that New York was the Nation's second largest wine market and they were unable to capitalize on that fact because of the direct shipment laws. *Id.*

[7] Swedenburg v. Kelly, 232 F. Supp. 2d 135, 153 (S.D.N.Y. 2002), *rev'd*, 358

versed the trial court.[8]

The United States Supreme Court consolidated these two cases in granting certiorari and held: affirmed the Court of Appeals for the Sixth Circuit and reversed the Court of Appeals for the Second Circuit.[9] Where states use Section Two of the Twenty-First Amendment to discriminate against out-of-state goods, the discriminatory state statute is beyond the scope of the Amendment and is unconstitutional under the Commerce Clause.[10]

II. RELATED LAW

The Commerce Clause of the United States Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[11] Additionally, the Commerce Clause has been interpreted to include a dormant aspect, which gives states the power to regulate "[i]n the absence of federal legislation," "so long as they act within the restraints imposed by the Commerce Clause itself."[12] Included in this dormant com-

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F.3d 223 (2d Cir. 2004), *rev'd sub nom.* Granholm v. Heald, 125 S. Ct. 1895 (2005). In holding for the plaintiffs, the trial court maintained that the Twenty-First Amendment did not shield a state regulation "from the reach of the Commerce Clause." *Id.* at 147.

[8] Swedenburg v. Kelly, 358 F.3d 223, 241 (2d Cir. 2004), *rev'd sub nom.* Granholm v. Heald, 125 S. Ct. 1895 (2005). The court determined that allowing the Commerce Clause to regulate liquor importation schemes of states would "render section 2 [of the Twenty-First Amendment] a nullity." *Id.* at 233.

[9] *Heald*, 125 S. Ct. at 1891-92. Justice Kennedy delivered the opinion of the Court, who was joined by Justices Scalia, Souter, Ginsburg, and Breyer. *Id.* at 1891. Justice Stevens filed a dissenting opinion, in which Justice O'Connor joined. *Id.* at 1891. Also, Justice Thomas filed a dissenting opinion and was joined by Chief Justice Rehnquist, Justice Stevens, and Justice O'Connor in his opinion. *Id.*

[10] *Id.* at 1892.

[11] U.S. CONST. art. I, § 8, cl. 3.

[12] City of Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978). Historically, the question of whether or not a state has violated the federal government's dormant commerce clause power is for the courts to determine, as the courts have the duty to declare "what is and is not a regulation of such commerce." Leisy v. Hardin, 135 U.S. 100, 119 (1890); *see* Scott v. Donald, 165 U.S. 58, 100 (1897) (explaining that whether or not a state law is a valid exercise of police power is a question for the Supreme Court); *see also* H.P. Hood & Sons, Inc. v. Du Mond,

merce clause power is the federal government's ability to prevent states from "unjustifiably. . . discriminat[ing] against or burden[ing] the interstate flow of articles of commerce."[13] When a state attempts to discriminate against out-of-state products and services, it is engaging in economic protectionism or isolation.[14] Because discriminating laws violate the Commerce Clause, the Court created a "*per se* rule of invalidity," which enables courts to strike down state laws that burden interstate commerce by engaging in economic protectionism.[15] But as the defendants in *Granholm v. Heald* suggested, the Twenty-First Amendment can be interpreted as giving power to the states in conflict with the powers granted to Congress under the Commerce Clause.[16]

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336 U.S. 525, 534-35 (1949) (expressing the belief that the Court has "advanced the solidarity and prosperity of this Nation" by giving meaning to the dormant commerce clause, which is one of the "great silences of the Constitution").

[13] Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 98 (1994). The two ways of violating the Commerce Clause include: "giving [an] economic advantage to in-state industry at the expense of out-of-state industry," and the other is through a nondiscriminatory state law that "places significant burdens on interstate commerce." Russ Miller, Note, *The Wine Is in the Mail: The Twenty-First Amendment and State Laws Against the Direct Shipment of Alcoholic Beverages*, 54 VAND. L. REV. 2495, 2501 (2001).

[14] *City of Philadelphia*, 437 U.S. at 623-24. The Court noted in *City of Philadelphia* that the clearest example of economic protective legislation is "a law that overtly blocks the flow of interstate commerce at a State's borders." *Id.* at 624; *see also* Baldwin v. G.A.F. Seelig, Inc. 294 U.S. 511, 527 (1935) (explaining that when states are placed in economic isolation, the entire commerce system is clogged).

[15] *City of Philadelphia*, 437 U.S. at 624. In a similar proposition, the court in *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.* explained that as a general rule, state statutes favoring in-state economic interests over out-of-state economic interests will be struck down without any further consideration. 476 U.S. 573, 579 (1986). Finally, adding the last piece to the analysis is *Healy v. Beer Institute*, which stated that as a general rule, courts can follow the "consistent practice of striking down state statutes that clearly discriminate against interstate commerce," unless the discrimination could be justified by a valid reason unrelated to economic protectionism. 491 U.S. 324, 340-41 (1989); *see also* C & A Carbone, Inc. v. Town of Clarkston, 511 U.S. 383, 390 (1994).

[16] 125 S. Ct. 1885, 1894 (2005). Accordingly, the States argued that the laws were valid because they exercised their Twenty-First Amendment powers, and the effects of the regulations on interstate commerce were just incidental. John McGee, *More Wine, Less Whining: Commerce Clause Trumps State Statutes*, 14-

The Twenty-First Amendment provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[17] The Supreme Court considered this conflict between two constitutional provisions in light of both Commerce Clause and Twenty-First Amendment precedent.

A. The Court's First Interpretation of the Twenty-First Amendment

Three years after the passage of the Twenty-First Amendment, the Supreme Court interpreted the power given to the states through this Amendment.[18] In *Young's Market Co.*, the Supreme Court maintained that a state statute requiring beer importers to pay a licensing fee was a valid exercise of a state's Twenty-First Amendment authority.[19] The Twenty-First Amendment gave the states "the power to forbid all importations which do not comply with the conditions which [the state] prescribes," and the Court stated that to allocate any less of a power would be "a rewriting of [the Amendment]."[20] Several decisions subsequent to *Young's Market Co.*

AUG BUS. L. TODAY 51, 53 (2005).

[17] U.S. CONST. amend. XXI, §2.

[18] State Bd. of Equalization of Cal. v. Young's Mkt. Co., 299 U.S. 59, 61-64 (1936). Prior to the passage of the Twenty-First Amendment, a state had very limited power to control liquor, as any importation fee imposed by a state burdened interstate commerce, and such a law would have been struck down because it violated the Commerce Clause. *Id.* at 62. In *Scott v. Donald*, the Supreme Court held that if a state had permitted the production and sale of alcohol, it could not discriminate against imported liquors because "such legislation is void as a hindrance to interstate commerce, and an unjust preference of the products of the enacting state." 165 U.S. 58, 101 (1897); *see also* Rhodes v. Iowa, 170 U.S. 412, 421-27 (1898); Vance v. W.A. Vandercook Co., 170 U.S. 438, 455-56 (1898). For a more in-depth analysis of other cases prior to the passage of the Twenty-First Amendment, see Miller, *supra* note 13, at 2503-12.

[19] 299 U.S. at 62-63. In *Young's Market Co.*, the plaintiffs, alcohol customers and importers, sued because the State of California required out-of-state liquor distributors to pay a license fee. *Id.* at 60-61.

[20] *Id.* at 63. The Court also noted that since the Twenty-First Amendment gave states the power to completely prohibit alcohol, the Amendment also included the power to adopt a lesser degree of liquor regulations. *Id.*

affirmed this rationale;[21] but the Court soon weakened its strong stance on the states' power to regulate liquor through several later cases.[22]

B. Reading the Constitution as a Whole

Nippert v. City of Richmond was the first sign of the Court's change in its view of the Twenty-First Amendment's far-reaching power granted to the states[23] when the Court stated in a footnote that the Twenty-First Amendment did not put intoxicating liquors "altogether beyond the reach of the federal commerce power."[24] However, in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*,[25] the Court applied definite limits to state liquor regulations for the first time since Prohibition.[26] The Court began its analysis by recognizing that if the commodity in question were anything other than liquor, the Commerce Clause would "clearly deprive" a state of the authority to "prohibit absolutely the passage of liquor through its territory," as the State of New York attempted to do in

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[21] *Mahoney v. Joseph Triner Corp.* maintained that *Young's Market Co.* decided that a state could discriminate against imported liquor, and the Court subsequently affirmed a state regulation that limited imported liquor. 304 U.S. 401, 402-03 (1938); *see* Ziffrin v. Reeves, 308 U.S. 132, 138 (1939); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395, 398 (1939); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391, 394 (1939).

[22] Marc Aaron Melzer, Comment, *A Vintage Conflict Uncorked: The 21st Amendment, the Commerce Clause, and the Fully-Ripened Fight over Interstate Wine and Liquor Sales*, 7 U. PA. J. CONST. L. 279, 288-90 (2004).

[23] Justin Lemaire, Note, *Unmixing a Jurisprudential Cocktail: Reconciling the Twenty-First Amendment, the Dormant Commerce Clause, and Federal Appellate Jurisprudence to Judge the Constitutionality of State Laws Restricting Direct Shipment of Alcohol*, 79 NOTRE DAME L. REV. 1613, 1626 (2004).

[24] 327 U.S. 416, 426 n.15 (1946).

[25] 377 U.S. 324 (1964).

[26] Lemaire, *supra* note 23, at 1628. The author went on to argue that *Hostetter* put states "on notice that their alcohol regulations would face limits based on federal authority." *Id.* Another commentator suggested that although *Hostetter* did not expressly overrule any of the Court's previous decisions construing the Twenty-First Amendment, the case marked "an unmistakable shift in the Court's interpretation" of the Amendment. Jonathan W. Garlough, Note, *Weighing in on the Wine Wars: What the European Union Can Teach Us About the Direct Shipment Controversy*, 46 WM. & MARY L. REV. 1533, 1549 (2005).

Hostetter.[27] But in the alcohol context, the Court expressed a desire to read the Twenty-First Amendment and the Commerce Clause "in the light of the other," as they "are parts of the same Constitution."[28] The Court also noted that to suggest that the Twenty-First Amendment revoked Congress's power to regulate alcohol under the Commerce Clause "would be patently bizarre and . . . demonstrably incorrect."[29] Thus, *Hostetter* is the foundation of the Court's continued lessening of the powers granted to the states by the Twenty-First Amendment.[30]

C. Creating a Balancing Test

The Supreme Court later clarified the inference made in *Hostetter* when it created a test to weigh the competing federal and state interests.[31] The test balanced the powers reserved for the federal government under the dormant commerce clause against the powers provided to states under the Twenty-First Amendment.[32] Ultimately in *Midcal Aluminum, Inc.*, the Court held that the state interests were not of the "same stature" as the federal interests or goals of the Sherman Act.[33]

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[27] *Hostetter*, 377 U.S. at 329. In *Hostetter*, New York tried to prevent a liquor importer from operating a duty-free liquor store in an airport. *Id.* at 325-26. The store would sell its liquor product to international travelers at the airport, where the product would not be accessible to the passengers until they reached their foreign destination. *Id.* at 325. Thus, New York was attempting to unconstitutionally interfere with commerce regulated by Congress under its power to regulate commerce with foreign nations, which a state simply cannot do. *Id.* at 334.

[28] *Id.* at 332 (citing *Collins v. Yosemite Park Co.*, 304 U.S. 518, 521-22 (1938)). In *Collins*, the State of California attempted to prevent alcohol from being imported into Yosemite National Park. 304 U.S. 518, 521-22 (1938). The Supreme Court ruled that the federal government had exclusive jurisdiction within the park and the State of California could not rely solely on the Twenty-First Amendment to regulate alcohol in that land area. *Id.* at 538.

[29] *Hostetter*, 377 U.S. at 331-32.

[30] Elizabeth D. Lauzon, Annotation, *Interplay Between Twenty-First Amendment and Commerce Clause Concerning State Regulation of Intoxicating Liquors*, 116 A.L.R. 5TH 149, 167 (2004-2005).

[31] Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 109-14 (1980). In several cases the Court considered similar conflicts between the Twenty-First Amendment and other federal powers, and concluded in each case that the federal interest in question outweighed the state interest. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996) (holding that the right to free speech granted to individuals in the First Amendment cannot be abrogated by the Twenty-First Amendment); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122 n5 (1982) (confirming that the powers of the Establishment Clause of the First Amendment were not lessened by the Twenty-First Amendment); Craig v. Boren, 429 U.S. 190, 207-08 (1976) (holding that the Twenty-First Amendment did

Capital Cities Cable, Inc. v. Crisp further illustrated this balancing test[34] when the Court evaluated a state statute banning alcohol advertisements in violation of federal regulations.[35] Although the Court ruled that the state statute was pre-empted by federal law, the Court applied a balancing test between the two competing interests to determine if Section Two of the Twenty-First Amendment saved the statute.[36] Upon weighing the interests, the Court held that the state's Twenty-First Amendment powers were "not directly implicated" since these powers included the right to regulate "the

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not alter the rights guaranteed under the Equal Protection Clause of the Fourteenth Amendment); Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971) (recognizing that the Twenty-First Amendment does not excuse a statute from the requirements of the Due Process Clause); Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 344 (1964) (explaining that the Twenty-First Amendment did not repeal the Export-Import Clause of the Constitution).

[32] *Midcal Aluminum, Inc.*, 445 U.S. at 110. The Court called this test a "pragmatic effort to harmonize state and federal powers" in the regulation of alcohol. *Id.* at 109.

[33] *Id.* at 114. The federal interest at issue was the Sherman Act, which banned resale price maintenance for the purpose of removing restraints on trade. *Id.* at 102. California violated the Act in requiring wine wholesalers to post their prices, but asserted that its state interests of "promot[ing] temperance and [maintaining] orderly market conditions" justified this violation. *Id.* at 99, 102, 112 (quoting Rice v. Alcoholic Beverage Control Appeals Bd., 579 P.2d 476, 490 (Cal. 1978).

[34] Miller, *supra* note 13, at 2518.

[35] 467 U.S. 691, 698 (1984). The State of Oklahoma prohibited liquor advertisements, and the State considered an in-state cable operator in violation of this policy whenever it carried any out-of-state signals containing such banned commercials. *Id.* at 694-95. The state statute was passed to "discourag[e] consumption of intoxicating liquor." *Id.* at 714-15. In terms of the federal interests at issue, the Federal Communications Commission regulations were designed to promote a broad range of cable broadcasting to a maximum number of viewers, a goal which would "unquestionably be frustrated by strict enforcement of the Oklahoma statute." *Id.* at 714-16.

[36] *Id.* at 711-16.

times, places, and manner under which liquor may be imported and sold."[37] Thus, in this case, the Court found that the balance shifted in favor of federal law and pre-empted the state law.[38]

D. Shifting the Balance in Favor of Expansive Federal Power

Several days after the Court issued *Capital Cities Cable, Inc.*, the Court made a clear shift in the weight given to the federal interest in conflict with a state liquor regulation in deciding *Bacchus Imports, Ltd. v. Dias*.[39] In *Bacchus Imports, Ltd.*, the court evaluated a Hawaiian state statute exempting in-state liquor producers from a state liquor tax.[40] The Court ruled that the statute violated the Commerce Clause, because it favored local business over out-of-state business, which was a clear violation of the Commerce Clause's policy of free-trade.[41] Therefore, the Court had to determine if the purposes of the Twenty-First Amendment saved the statute from being held unconstitutional.[42]

In *Bacchus Imports, Ltd.*, the Court recognized that "[i]t is by now clear that the [Twenty-First] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause."[43] The Court maintained that a balancing test is required so the court can determine "whether the principles underlying the Twenty-First Amendment are sufficiently implicated . . . to outweigh the Commerce Clause principles that would otherwise be offended."[44] In this case, the Court held that because the State did not enact its regulation "to combat the perceived evils of an unrestricted traffic in liquor," the law is unconstitutional, as a liquor regulation cannot violate "a central tenet of the Commerce Clause" when it is "not supported by any clear concern of the Twenty-[F]irst Amendment.[45] The end result of *Bacchus Imports, Ltd.* is a test that weighs the interests of two parts of the same Constitution: the dormant commerce clause and the Twenty-First Amendment.[46] The Court later added other core concerns or principles of the Twenty-First Amendment to consider in applying this test, including "promoting temperance, ensuring orderly market conditions, and raising revenue."[47]

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[37] *Id.* at 716. The listing of powers given to states under the Twenty-First Amendment signaled the Court's shift in analyzing state statutes regulating alcohol, as the Court began to narrowly focus on the purposes of the Amendment and how they related to the interests of the states. Vijay Shanker, Note, *Alcohol Direct Shipment Laws, The Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 372-73 (1999).

[38] *Capital Cities Cable, Inc.*, 467 U.S. at 716. In other words, because the state interest was "outside" the Twenty-First Amendment's purposes, the state interest was given very little weight when balanced against the federal interest. Tracy Shimer Garman, Comment, *These Grapes Are Ripe for Pickin': A Respectful Limit on State Power to Regulate Importation of Wine Under the Twenty-First Amendment*, 57 SMU L. REV. 1555, 1564 (2004).

[39] 468 U.S. 263, 265 (1984). Until *Granholm v. Heald* was decided, many observers considered *Bacchus Imports, Ltd.* to be the "most significant decision" in terms of settling the tension between the powers granted under the Twenty-First Amendment and under the dormant commerce clause. Duncan Baird Douglass, Note, *Constitutional Crossroads: Reconciling the Twenty-First Amendment and the Commerce Clause to Evaluate State Regulation of Interstate Commerce in Alcoholic Beverages*, 49 DUKE L.J. 1619, 1640 (2000).

[40] 468 U.S. at 265.

[41] *Id.* at 270-73.

[42] *Id.* at 274.

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[43] *Id.* at 275.

[44] *Id.*

[45] *Id.* at 276. On the other hand, the dissenting opinion disagreed with evaluating state law according to central purposes of the Twenty-First Amendment, but instead argued that the Court should simply ask whether or not the state was exercising a power conferred upon it by the Constitution. *Id.* at 286-87 (Stevens, J., dissenting).

[46] Lemaire, *supra* note 23, at 1634-35. Also, the Court's decision marked the first time that a state's right to impose liquor regulations was limited by the dormant commerce clause. *Id.* at 1635.

[47] North Dakota v. United States, 495 U.S. 423, 432 (1990). After the Court stated these additional concerns of the Twenty-First Amendment in the *North Dakota* decision, some observers stipulated that the Court had "shed some light on what [the] principles [of the Amendment] might be." Timothy Schnabel, Case Note, *A Circuit-Splitting Headache: The Hangover of the Supreme Court's Twenty-First Amendment Jurisprudence*, 21 YALE L. & POL'Y REV. 547, 550 (2003).

III. *GRANHOLM V. HEALD*

A. *Majority Opinion*

In *Granholm v. Heald*, the Supreme Court began the opinion by stating that laws banning the direct shipment of out-of-state wine conflicted with the Commerce Clause.[48] The Court held that such laws were discriminatory and at conflict with one of the goals of the Commerce Clause: creating minimal competition amongst the states.[49] After determining a conflict, the Court then decided whether or not the Twenty-First Amendment saved the states' statutes.[50] In establishing the scope of the states' Twenty-First Amendment powers, the Court looked at state powers before the passage of the Eighteenth Amendment, which prohibited the use of alcohol in the United States.[51] Upon concluding that the states' powers prior to the Twenty-First Amendment did not include the right to discriminate against out-of-state goods, the Court found that the Twenty-First Amendment did not confer this power upon the states.[52] Although the Court considered this conclusion consistent with decisions made prior to the passage of the Twenty-First Amendment, there were some conflicting cases it had to address when rendering its opinion.[53] The Court believed that the *Young's Market Co.* line of cases did not consider the history prior to the adoption of the Twenty-First Amendment and the holdings were inconsistent with this history.[54] Thus, only state policies that treated liquor produced in-state and out-of-state equally were valid exercises of a state's Twenty-First Amendment powers.[55]

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[48] 125 S. Ct. 1885, 1896-97 (2005).

[49] *Id.* at 1895-97.

[50] *Id.* at 1897.

[51] *Id.* at 1897-1902. The Court decided that the relevant liquor statutes of the time, the Wilson Act and the Webb-Kenyon Act, did not allow states to discriminate against out-of-state liquor distributors. *Id.* at 1902; *see supra* note 18 and accompanying text.

[52] *Heald*, 125 S. Ct. at 1902.

[53] *Id.* at 1903; *see supra* notes 20, 21 and accompanying text.

[54] *Heald*, 125 S. Ct. at 1902-03. According to the Court, the Court's early opinions interpreting the Twenty-First Amendment support the conclusion that the Amendment's framers did not intend to provide states with the power to discriminate against out-of-state liquors. *Id.* at 1903.

Nonetheless, the Court's inquiry did not stop after deciding that state discriminatory liquor laws were "not saved by the Twenty-First Amendment."[56] The Court applied its previously articulated test of upholding a discriminatory state statute if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[57] Both Michigan and New York asserted as state interests that their laws protect minors and generate tax revenue,[58] which was one of the Twenty-First Amendment's core principles recognized earlier by the Supreme Court.[59] In analyzing the state interests, the Court held that when laws are in violation of the Commerce Clause, they must have the "clearest showing" of legitimate local interests to substantiate a discriminatory effect.[60] The Court invalidated the states' justification of keeping alcohol out of the hands of minors.[61] The Court reasoned that restricting out-of-state shipment of wine would not prevent minors from getting direct shipment of in-state wines, that out-of-state wineries would not jeopardize their in-state licenses by selling to minors, that few minors drink wine, and that other less restrictive means could accomplish the same goal.[62]

In a similar fashion, the Court also struck down the States' other proposed rationale for discriminatory laws—to generate tax revenue.[63] The States argued that they would lose tax revenue if direct shipment was permitted, but the Court saw a potential for tax evasion regardless of whether the wine was shipped from in-state or out-of-state, so the discrimination was unjustified.[64] In holding that both Michigan's and New York's statutes were beyond the scope of the Twenty-First Amendment, the Court concluded that if a state wished to regulate the direct shipment of wine, it had to be done in "evenhanded terms."[65]

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[55] *Id.* at 1905.

[56] *Id.*

[57] *Id.* (quoting New Energy Co. of Ind. v. Limbach, 49 U.S. 269, 278 (1988)).

[58] *Id.*

[59] *See supra* note 47 and accompanying text.

[60] *Heald*, 125 S. Ct at 1905 (citing C & A Carbone, Inc. v. Town of Clarkston, New York, 511 U.S. 383, 393 (1994)). The *C & A Carbone, Inc.* Court was essentially expressing the idea that the violating law must be attempting to rectify a local problem that could not be accomplished in a nondiscriminatory interstate commerce market. *C & A Carbone, Inc.*, 511 U.S. at 393.

[61] *Heald*, 125 S. Ct. at 1905-06.

[62] *Id.* For instance, other less restrictive means included requiring an adult signature upon delivery of shipped wine and a wine label requiring an adult signature. *Id.* at 1906.

[63] *Id.* at 1906-07. Thus, the Court adhered to its practice of giving "little

B. Justice Stevens' Dissenting Opinion

In his dissent, Justice Stevens argued that alcohol should still be treated as a special good, exempt from the regulations under the dormant commerce clause.[66] In making this conclusion, Justice Stevens relied upon the context of the Twenty-First Amendment's ratification, a time when the majority of the country morally condemned the use of alcohol and viewed it as "demon rum."[67] While his argument was a historical one, he recognized that the majority's opinion could be a "sound economic policy" and consistent with the views of the

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deference to a state's assertion" of their liquor regulation being passed "pursuant to a core power of the Twenty-First Amendment." Douglass, *supra* note 39, at 1643.

[64] *Heald*, 125 S. Ct. at 1906-07. Furthermore, Michigan's system required out-of-state wineries to pay taxes directly to the State of Michigan, meaning that the system did not rely on the wholesalers who imported the wine to pay the taxes. *Id.* at 1906. Thus, the state's three-tier system appeared to accurately collect taxes, allowing direct shipment of wine under this established system should present no problems. *Id.* In New York, the Court suggested that the state could ensure tax revenue by requiring licensed wineries that ship directly to report sales regularly and to "remit taxes." *Id.* In support of this system, the Court claimed that New York used it for in-state wineries' direct shipments, and that it was also used successfully in states that allow direct shipment of out-of-state wine producers. *Id.* Therefore, the Court saw no reason why this system of issuing licenses would not be an effective way for New York to collect tax revenue. *Id.*

[65] *Id.* at 1907.

[66] *Id.* at 1907-09 (Stevens, J., dissenting).

[67] *Id.* at 1908-09. Also relevant to his position was the fact that the Twenty-First Amendment was the only Amendment to have been ratified by people at state conventions, rather than by state legislatures. *Id.* at 1909. He argued that the special passage of the Amendment further supported his point that alcohol was special, not "an ordinary article of commerce." *Id.*

drafters of the original Constitution.[68]

C. *Justice Thomas' Dissenting Opinion*

Justice Thomas accused the majority's holding of creating an "ad hoc exception," meaning that the Court's decision gave states the power to regulate liquor in all circumstances except when they discriminated against out-of-state liquor products.[69] He proposed a historical argument to explain why a law banning direct importation was discriminatory, and a law favoring local products was not.[70] Justice Thomas stated that the Wilson Act and the Webb-Kenyon Act nullified the federal government's right to assert that a state liquor law violated the dormant commerce clause.[71] Therefore, Justice Thomas believed that Michigan's and New York's laws were valid under the Wilson and Webb-Kenyon Act because of the broad powers granted to the states by these Acts.[72]

Alternatively, Justice Thomas made the argument that Section Two of the Twenty-First Amendment conferred upon the states the power to regulate liquor free from the dormant commerce clause simply upon the plain meaning of the Amendment, meaning it "provides that any importation into a State contrary to state law violates the Constitution."[73] With the exception of *Bacchus Imports, Ltd.*, Justice Thomas maintained that all cases prior to the *Heald* decision were consistent with his view.[74] Finally, he thought that the majority's opinion was flawed because it relied heavily on *Bacchus Imports, Ltd.*, but did not apply the test that the case established.[75] In concluding his lengthy dissent, Justice Thomas sympathized with the majority's opinion because he thought the majority was attempting to serve the nation well, but, he added, the Twenty-First Amendment took the right to make such decisions out of the Court's hands.[76]

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[68] *Id.* He suggested that the majority's ruling might be in line with the views of "the contemporaries of Adam Smith who drafted our original Constitution," as they would probably agree with the Court's ruling of minimizing restrictions to commerce. *Id.* at 1909.

[69] *Id.* at 1911 (Thomas, J., dissenting).

[70] *Id.* at 1910-19. This view is in conflict with the majority's view of discrimination, which defined discrimination as a state regulation burdening out-of-state producers to convey a competitive advantage to those businesses producing goods in-state. *Id.* at 1895 (majority opinion). He went on to claim that although *Scott* struck down laws that banned direct shipment of liquor, later laws (the Wilson Act and the Webb-Kenyon Act) reversed this ruling, meaning that the Wilson Act and the Webb-Kenyon Act gave states the power to discriminate. *Id.* at 1910-19 (Thomas, J., dissenting).

[71] *Id.* at 1913.

[72] *Id.* at 1910-19. Since Michigan's and New York's laws were valid under these Acts, he argued that they were also valid under the Twenty-First Amendment, as he stated that these rights given to the states were subsumed by the Amendment. *Id.*

[73] *Id.* at 1926. In other words, he believes that the majority turned the

IV. Discussion

The Supreme Court, in deciding *Granholm v. Heald*, confronted many prior cases, statutes, and other sources which proposed a variety of ways to interpret the Twenty-First Amendment, as the majority and two dissenting opinions illustrate. Nonetheless, the Court determined that a state regulation favoring in-state liquor over out-of-state liquor was unconstitutional under the dormant commerce clause.[77] The interesting part of the *Granholm* case is not only the conclusion declared by the Court, but also the Court's means used to reach the decision. As Justice Thomas noted in his dissent, the Court appeared to disregard the core concerns guidelines for analyzing a state liquor regulation that it had laid out in *Midcal Aluminum, Inc.*, and affirmed in both *Capital Cities Cable, Inc.* and *Bacchus Imports, Ltd.*[78] The Court simply

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"Amendment's text on its head" when the Court held that Michigan's and New York's laws violated the Twenty-First Amendment. *Id.* at 1920.

[74] *Id.* at 1920, 1924-26. He stated that *Bacchus Imports, Ltd.* should be overturned because it was the only case holding that the Twenty-First Amendment did not free states from the rules of the dormant commerce clause. *Id.* at 1926. Also, Justice Thomas does not propose that the Twenty-First Amendment would free states from all other constitutional limits, like the Due Process and Equal Protection Clauses. *Id.*; *see supra* note 31 and accompanying text.

[75] *Id.* at 1925.

[76] *Id.* at 1927.

[77] *Id.* at 1907. *See supra* notes 13-15 and accompanying text.

[78] *Heald*, 125 S. Ct. at 1925 (Thomas, J., dissenting). Perhaps this omission was done, as Justice Thomas argued, because the Court realized that the *Bacchus*

considered the legitimacy of the local interests asserted by the states, without weighing them against the federal interests.[79] As a result of this omission, future defenders of state liquor regulations are left to question whether or not their law is constitutional because it is nondiscriminatory or because it advances a core concern of the Twenty-First Amendment that outweighs a federal interest.[80] This omission could be another way in which the Court is slowly stripping the states of their Twenty-First Amendment power.[81]

Perhaps this holding relates to an idea that the Court only alluded to—technology.[82] While the Court discussed technology as a means of helping states regulate out-of-state wineries, technology in the context of promoting an efficient economy could have been a deciding factor in the *Heald* holding.[83] Even as Justice Thomas suggested in his dissent, the Court's decision could be viewed as an attempt to serve the nation.[84] Thus, the majority might have considered the country best served when trade barriers that hinder our modern economy are removed.[85]

V. CONCLUSION

In deciding *Granholm v. Heald*, the Court decided that the dormant commerce clause trumped a state's right to regulate liquor under the Twenty-First Amendment, at least when the state statute is discriminatory. The Court did analyze local interests asserted by the States, but quickly questioned their legitimacy. However, the Court did not weigh these interests against federal interests that the state laws violated,

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Imports, Ltd. test was a "grave departure" from the Court's previous Twenty-First Amendment decisions. *Heald*, 125 S. Ct. at 1925 (Thomas, J., dissenting).

[79] *Id.* at 1905-07; *see supra* pp. 11-12 and notes 57-65.

[80] *See supra* notes 13-15, 47 and accompanying text.

[81] *See* Lauzon *supra* note 30.

[82] *Heald*, 125 S. Ct. at 1907.

[83] McGee, *supra* note 16, at 57.

[84] *Id.* at 1927; *see supra* note 74 and accompanying text.

[85] McGee, *supra* note 16, at 57. McGee noted that trade barriers will not work in our modern economy—"the age of globalization and the Internet." *Id.*

which was the test the Court had previously asserted as the means to resolve a conflict between the Twenty-First Amendment and another constitutional provision. This omission represents on a larger scale a further shift in the Supreme Court's interpretation of the Twenty-First Amendment in just its seventy-year history. In the end, the *Granholm v. Heald* decision resulted in the dormant commerce clause providing the country with yet another market freed from interstate barriers attempting to minimize competition.

Nancy Williams

BOOK REVIEW

DEBORAH H. BELL, BELL ON MISSISSIPPI FAMILY LAW (2005)

Reviewed by Lee Will Berry

I. INTRODUCTION

Family law has significantly grown and developed from its beginnings in the English ecclesiastical courts[1] to the amalgam of legal topics it encompasses across the United States today. The addition of the twelve grounds for fault-based divorce in Mississippi,[2] the United States Supreme Court decisions in the 1970s on gender equality,[3] and current legal issues make family law more complicated than ever. *Bell on Mississippi Family Law*[4] is a book that addresses these complexities by outlining the history of family law, addressing the changes brought about in the last thirty years, providing current legal remedies, and offering insights into the problems that have yet to be addressed in a Mississippi court.

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[1] *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 2.2 at 31, § 3.1, at 125, § 12.1, at 407 (2d ed. 1988); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 202 (1985); Arland Thornton, *Comparative and Historical Perspectives on Marriage, Divorce, and Family Life*, 1994 UTAH L. REV. 587, 590-95 (1994). *See generally* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 422-28, 440-41, 454-59; MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW (1989); STEPHANIE COONTZ, THE SOCIAL ORIGINS OF PRIVATE LIFE: A HISTORY OF AMERICAN FAMILIES 1600-1900, at 87 (1988); STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 90-91 (1988).

[2] MISS. CODE ANN. § 93-5-1 (2004). *See* J.W. BUNKLEY & W.E. MORSE, AMIS

Modern changes have altered the definition of "family" and the legal rights accorded to each party. A family no longer solely includes a father, a mother, and their children. Instead, a wide range of parties may have legal rights, including grandparents,[5] adoptive parents,[6] step-parents,[7] siblings,[8] half-siblings,[9] biological fathers,[10] and legal fathers.[11] These

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ON DIVORCE & SEPARATION IN MISSISSIPPI § 3.15, at 134 (1957).

[3] Orr v. Orr, 440 U.S. 268 (1979). *See also* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003); Miller v. Albright, 523 U.S. 420 (1998); J.E.B. v. Ala. *ex rel.* T.B., 511 U.S. 127 (1994).

[4] DEBORAH H. BELL, BELL ON MISSISSIPPI FAMILY LAW (2005).

[5] *See* MISS. CODE ANN. §§ 93-16-3, 93-16-5, 93-16-7 (2004) (establishing grandparents right to visitation). *See also* Troxel v. Granville, 530 U.S. 57, 70-71 (2000) (distinguishing third party visitation that does not interfere with parent/child relationship); Brocato v. Brocato, 731 So. 2d 1138, 1142-43 (Miss. 1999) (upholding de facto custody award to grandmother); Martin v. Coop, 693 So. 2d 912, 916 (Miss. 1997) (listing factors to consider for visitation by grandparents); Dearman v. Dearman, 811 So. 2d 308, 314-15 (Miss. Ct. App. 2001) (upholding grandparents visitation rights).

[6] *See* MISS. CODE ANN. § 93-17-13 (2004) (stating adoptive parents assume all parental rights and obligations). *See also* Adams v. Adams, 467 So. 2d 211, 214 (Miss. 1981) (enforcing adopted parent's right despite parental separation three months before).

[7] *See* Logan v. Logan, 730 So. 2d 1124, 1127 (Miss. 1998) (granting temporary custody to step-father).

[8] *See* Sellers v. Sellers, 638 So. 2d 481, 485 (Miss. 1994) (taking separation of siblings into account when considering *Albright* factors); Mixon v. Bullard, 217 So. 2d 28 (Miss. 1968) (noting separation from siblings as factor for determining custody); Moore v. Moore, 757 So. 2d 1043, 1050 (Miss. Ct. App. 2000) (refusing modification because would separate brothers); Sootin v. Sootin, 737 So. 2d 1022, 1026-27 (Miss. Ct. App. 1998) (taking separation of siblings into account when considering *Albright* factors) Franklin v. Kroush, 622 So. 2d 1256 (Miss. 1993).

[9] *See* McWhirter v. McWhirter, 811 SO. 2d 397, 399 (Miss. Ct. App. 2001) (awarding custody to mother to allow child to remain with half-siblings).

[10] *See* Karenina v. Presley, 526 So. 2d 518, 522 (Miss. 1988) (upholding suspected biological father's right to bring paternity action); Baker v. Williams, 503

modern changes have delegated legal rights that were inconceivable as early as thirty years ago. Some of the new rights in Mississippi include two additional types of alimony,[12] establishment of joint custody,[13] a basis for no-fault divorce,[14] and a marital property system based on equitable distribution.[15]

Modern changes have also transformed the source of rules governing family law. While customarily considered the sole jurisdiction of each state, significant sections of family law are now controlled by uniform acts and federal laws.[16] Family law today includes all matters concerning: marriage; dissolution of marriage, whether through divorce or annulment; child custody; division of assets; and parental rights.

While there have been drastic changes, there are still many problems that are destined to arise. For example, there is still a feeling of gender inequality in Mississippi.[17] On the

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So. 2d. 249, 252 (Miss. 1987) (same).

[11] *See* MISS. CODE ANN. § 93-15-107 (2004) (stating legal fathers shall be a party to termination proceedings). *See also* Krohn v. Migues, 274 So. 2d 654, 655 (Miss. 1973) (holding legal fathers as necessary party to termination proceedings); Williams v. Williams, 843 So. 2d 720, 722 (Miss. 2003) (allowing legal fathers relief from prior support obligations); M.A.S. v. Mississippi Department of Human Services, 842 So. 2d 527 (Miss. 2003) (same).

[12] *See* Hubbard v. Hubbard, 656 So. 2d 124, 130 (Miss. 1995) (recognizing rehabilitative alimony); Guy v. Guy, 736 So. 2d 1042, 1046 (Miss. 1999) (recognizing reimbursement alimony).

[13] MISS. CODE ANN. § 93-5-24 (2004). *See* Rutledge v. Rutledge, 487 So. 2d 218 (Miss. 1986); Mabus v. Mabus, 847 So. 2d. 815 (Miss. 2003).

[14] MISS. CODE ANN. § 93-5-2 (2004).

[15] Ferguson v. Ferguson, 639 So. 2d 921, 925 (Miss. 1994) ("With this opinion, this Court adopts guidelines for application of the equitable distribution method of division of marital assets.").

[16] *See* Uniform Interstate Family Support Act, 42 U.S.C. § 666 (2004) (specifically MISS. CODE ANN. §§ 93-25-1 to 93-25-117 (2000)); Child Support Recovery Act of 1992, 18 U.S.C. § 228 (2004); Family Support Act of 1988, 42 U.S.C. §§ 651-669 (2000); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, tit. I, 101-116, Pub. L. No. 104-193, 110 Stat. 2105, 2110-85 (codified as amended in scattered sections of 42 U.S.C.); MISS. CODE ANN. § 41-41-203 (1994) (modeled after the Uniform Health Care Directives Act).

[17] John W. Winkle III, Task Force on Gender Fairness, *Final Report of the Supreme Court of Mississippi Task Force on Gender Fairness August 26, 1998 – October 31, 2002*, 73 MISS. L.J. 1219, 1232 (2004) ("Strong majorities believe that men and women receive unequal treatment in Mississippi courts when it comes to

subject of alimony, antiquated rules and legal theories are still supplemented instead of replaced.[18] Inequality, however, is not always towards women.[19] There is still an overwhelming belief that maternal preference is still exercised by the courts,[20] despite the newer rule of parental equality.[21] A further and potentially bigger problem is same-sex marriages. This is a problem facing not only Mississippi, but the nation as a whole. There are numerous potential legal issues that could arise due to conflict between state and federal law.[22]

II. ORGANIZATION

Bell on Mississippi Family Law is divided into twenty sections. Each section discusses a legal topic related to family law, ranging from "The Marital Relationship"[23] to "Adoption."[24] The twenty sections can be roughly broken down into the general family law topics of: marriage rights, divorce and annulment, child custody, division of property and assets, alimony and child support, and various procedural requirements and agreements.

Each section of the book begins with a history of the legal topics addressed. These histories include a chronological narrative on the foundation and basis for the legal rules presented in the section. The histories range from the old, like the

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child custody and support awards, and they regard women as the beneficiaries.") (emphasis omitted).

[18] *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 5.01-.05 (2002) (discussing problems with alimony and seeking to replace alimony with "compensatory spousal payments"). *See generally* Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23 (2001); Virginia R. Dugan & Jon A. Feder, *Alimony Guidelines: Do They Work?*, 25 FAM. ADVOC. 20 (2003).

[19] Winkle, *supra* note 16, at 1232.

[20] Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983) (replacing maternal preference with presumption of parental equality).

[21] Winkle, *supra* note 16, at 1232.

[22] *See, e.g.*, Michael H. Hoffheimer, *Mississippi Conflict of Laws*, 67 MISS. L.J. 175, 240-41 (1997).

[23] DEBORAH H. BELL, BELL ON MISSISSIPPI FAMILY LAW § 1, at 1-36 (2005).

[24] *Id.* at § 17, at 417-30.

right to annulment based on the English ecclesiastical courts' jurisdiction, to the very new, like no-fault divorce. From there the book is broken into subsections to address specific issues in detail.

The book begins by presenting the legal basis and particular rights accorded to the marital relationship. From there, the book introduces the legal complications that arise upon dissolution of the marriage, either through divorce or annulment. These complications include the grounds for annulment, the twelve fault-based grounds for divorce, and the complex requirements of irreconcilable differences divorce. The book also discusses the prerequisites and requirements to proceed with any of the legal grounds for dissolution.

After finding a basis for dissolution of marriage, the complications only intensify. The modern custody law presumptions, requirements, and procedures are discussed in depth. Closely aligned are the issues that arise concerning property and asset division. The book addresses the modern marital property system and the changes it has produced. Highlighted in this section are the similarities and differences, as well as the advantages and disadvantages, between the equitable distribution system, the community property system, and the common law title system. The section on dissolution closes with a discussion on the procedural complications that arise from each system.

From there, the book delivers analysis on the difficulties arising from alimony and child support. The legal requirements are now aligned with the principle of paternal equality and concretely established in the modern day *Albright* factors.[25] The book discusses the various types of alimony, including the additional forms added in recent years, the relevant factors used by the courts, the grounds for modification, and the different bases for termination. The book concludes by addressing procedural issues such as jurisdiction and ethical issues. At the back of the book is an index and a table of cases listing all cases cited in the footnotes.

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[25] *Albright*, 437 So. 2d at 1005.

III. DISCUSSION

Bell on Mississippi Family Law is a broad yet comprehensive compilation of family law topics in Mississippi. The sections cover almost every conceivable aspect of family law, approaching the topics in a manner that is simple enough for a law student but with enough depth to help an experienced practitioner.

Although not designed as a textbook, *Bell on Mississippi Family Law* is a solid basis from which to begin the study of family law. The book provides straightforward explanations coupled with uncomplicated analysis. There are also examples for complex procedures, such as res judicata in divorce actions. Without any prior knowledge, someone could read this book or merely the sections applicable to their problem and have a solid foundation from which to begin. However, there is some material covered in the book, particularly the sections on the Uniform Interstate Family Support Act[26] and the Uniform Child Custody Jurisdiction Enforcement Act,[27] which are beyond a beginner's ability to fully understand. Overall, the book is an excellent overview, especially in light of the few resources on family law in Mississippi.[28]

Chancellors and family law practitioners will find this book to be a great reference tool. Every topic the book covers is extensively supported with specific cases and applicable secondary sources. However, the sections on the Employee Retirement Income Security Act of 1974[29] and the Qualified Domestic Relations Orders[30] could be more fully developed and the book lacks any section on surrogate or intended parents. The book does provide good examples from the Mississippi court system and analogous examples from other states when no applicable Mississippi cases apply.

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[26] 42 U.S.C. § 666 (2004) (specifically MISS. CODE ANN. §§ 93-25-1 to 93-25-117 (2000))

[27] 9B U.L.A. (2001). (Not sure if this is right)

[28] There are other resources. *See, e.g.* N. SHELTON HAND, JR., MISSISSIPPI DIVORCE, ALIMONY & CHILD CUSTODY (6th ed. 2003); D. MICHAEL FEATHERSTONE, A LAW STUDENTS GUIDE TO MISSISSIPPI FAMILY LAW (1991); J. RANDALL PATTERSON, FAMILY LAW LITIGATION IN MISSISSIPPI (1996); B. STIRLING TIGHE, FAMILY LAW IN MISSISSIPPI (1987).

[29] 29 U.S.C. §§ 1001-1461 (1974).

[30] 29 U.S.C. § 1056 (1974).

The histories in each section give an insightful look into the basis for the various rules and provide the reader with a solid background to start from. The subsections are concise and easy to read, yet large enough to include all relevant information. The subsections provide detailed explanations of family law issues and significant background examinations. The footnotes provide a fountain of information and additional material to readers in search of applicable cases and statutes.

The book addresses current issues, such as same-sex relationships, abortion, and the rights of unmarried partners, by providing opinions based on legal trends. Many of the issues have yet to be addressed by the Mississippi court system.

To keep the material current, yearly supplements and new editions are planned for release every five years. The book is a good learning vehicle for those wishing to learn the basics of family law and an essential reference tool for Chancellors and family law practitioners in Mississippi wishing to learn the intricacies of the law.

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